86-150 (1)

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

v.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

On appeal from the Wisconsin Court of Appeals, District II, following a denial of review by the Wisconsin Supreme Court

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JURISDICTIONAL STATEMENT

E. Campion Kersten
Kenan J. Kersten
Ann L. Muchin
Louis R. Ullenberg

Kersten & McKinnon
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 271-0054

Louis R. Ullenberg
724 East Euclid Avenue
Milwaukee, Wisconsin 53207
(414) 744-4289

62pp

QUESTIONS PRESENTED

I. Where Wisconsin Law had permitted a competent conservatee to dispose of her property and a competent conservatee gifted her property to another, with notice to the conservator and the court, are the conservatee and donee deprived of due process of law where, after the death of the conservatee, the state's appellate court voids the gift although neither the conservatee nor the donee were timely notified the gift would be challenged? [1]

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1 The parties to the proceeding in the Circuit Court of Fond du Lac County were as follows: Lillian Zobel (plaintiff) was subject to a conservatorship at the time of the gift in issue, but in a later and independent proceeding was subject to a guardianship; her guardians, Herbert Z. Hancox and Helen W. Hancox (brought a foreclosure action as plaintiffs, ostensibly on her behalf yet contrary to her expressed interests); Lee Fenendael and Gloria Fenendael were designated as the donees and defendants at trial.

The plaintiffs appealed to the Wisconsin Court of Appeals, District II, as appellants and the defendants were the respondents. The court of appeals reversed the trial court's judgment so (Cont.)

II. Should the United States Supreme Court remand this case to the Wisconsin Supreme Court and direct it to exercise its appellate jurisdiction when the Wisconsin intermediate appellate court certified the case to the Wisconsin Supreme Court seeking its guidance on the right of a conservatee to dispose of property, the Wisconsin Supreme Court refused the certification, the intermediate appellate court issued a decision voiding the gift of a competent conservatee and the Wisconsin Supreme Court then refused to review that decision?

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the defendants-respondents petitioned the Wisconsin Supreme Court for review as petitioners and the plaintiffs-appellants were designated as respondents before the state supreme court. Following a denial of review, the defendants are appealing to the United States Supreme Court and the plaintiffs are the appellees before this court.

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Plaintiff-Appellee,

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LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

CERTIFICATE OF INTEREST

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this court may evaluate possible disqualification or recusal: Lillian Zobel or the Estate of Lillian Zobel (plaintiffs-appellees); Herbert Z. Hancox

(plaintiff-appellee); Helen W. Hancox (plaintiff-appellee); Lee Fenendael (defendant-appellant); and Gloria Fenendael (defendant-appellant); and the following law firms: Colwin, Fortune, Colwin, Pomeroy & English, S.C.; Kersten & McKinnon and Louis R. Ullenberg.

E. Campion Kersten
Attorney of Record for
the Appellants

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OPINION BELOW

This case is a published decision elevated to precedential stature in Wisconsin, reported in the official Wisconsin reports as Zobel v. Fenendael, 127 Wis. 2d 382, 379 N.W.2d 887 (Ct. App. 1985). (The court's slip opinion is included in the appellants' appendix as App. 1)

JURISDICTIONAL BASES FOR SUPREME COURT REVIEW

The United States Supreme Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257(2), where a Wisconsin court has rendered a final decision interpreting and applying the state's conservatorship statute in such a way as to render it repugnant to both the United States and Wisconsin Constitutions. It is the appellants' position that this case should be reviewed as an appeal. However, if this court decides that an

appeal was improvidently taken we respectfully request that this court regard this jurisdictional statement as a petition for certiorari, pursuant to 28 U.S.C. §§ 1257(3) and 2103.

The United States Supreme Court additionally has jurisdiction pursuant to 28 U.S.C. § 2106, to modify or reverse the Wisconsin Court of Appeals' decision or to remand the cause to the Wisconsin Supreme Court for such further proceedings as may be just under these circumstances. Such action is particularly appropriate in this case since the rights of the conservatee and her donee were defeated, after the conservatee's death, by a decision rendered in an intermediate appellate court, acknowledged to have been made in uncertainty and without the guidance it sought from the Wisconsin Supreme Court, which denied both certification and review.

NATURE OF PROCEEDINGS

This action began as a foreclosure commenced in the Circuit Court for Fond du Lac County in Wisconsin. The case was tried to a jury in March of 1984. The jury found in favor of the defendants and judgment was entered on the jury's verdict on June 21, 1984. The plaintiffs' filed a notice of appeal from the circuit court's judgment with the Wisconsin Court of Appeals, District II, on August 2, 1984. Following briefing and oral argument, the court of appeals certified the case to the Wisconsin Supreme Court on August 14, 1985. (The court's certification to the Wisconsin Supreme Court is included in the appellants' appendix as App. 2.) Certification was denied on October 8, 1985. The court of appeals reversed the trial court's judgment on November 20, 1985. The defendants-respondents

petitioned the Wisconsin Supreme Court for review December 20, 1985 and the Wisconsin Supreme Court denied review April 8, 1986. (The Wisconsin Supreme Court Final Order Denying Review is included in the appellants' appendix as App. 4.) The defendants-respondents now appeal from the November 20, 1985 adverse decision of the Wisconsin Court of Appeals, District II, and the subsequent denial of review by the Wisconsin Supreme Court in an April 8, 1986 final order.

INTRODUCTION

This is an action for foreclosure on a land contract which was commenced to invalidate a gift from Lillian Zobel to Gloria Fenendael forgiving the balance due on a land contract on the grounds that Lillian Zobel was not mentally competent at the time of the gift.

Procedural Status of the Case and Dispositions in the Trial and Appellate Courts

Following a jury trial in which Lillian Zobel was found to be mentally competent at the time of the transaction in issue the trial court entered judgment on June 21, 1984 in favor of the defendants dismissing the foreclosure action, declaring all amounts due under the land contract to be satisfied and vesting title of the property in Gloria Fenendael. (The trial court's written decision on motions after verdict is included in the appellants' appendix as App. 3 and is hereinafter referred to as "Decision.") Decision at 19-20. During the trial at the close of the plaintiffs' evidence, the plaintiffs moved the court to find as a matter of law that when Lillian Zobel forgave the balance due on the land contract she lacked the legal capacity to do so because she was subject

to a conservatorship. A ruling on this motion was deferred until after the trial. On motions after verdict, the plaintiffs moved to amend the complaint to allege the gift was void because of the conservatorship and for judgment notwithstanding the verdict. In denying these motions and ordering judgment in favor of Gloria Fenendael, the trial court ruled that the plaintiffs' motion to amend the complaint was not timely and that there was no legal preclusion in Wisconsin statutory or case law barring a conservatee from disposing of her property. (App. 3, Decision at 15.) The plaintiffs appealed the trial court's judgment to the Wisconsin Court of Appeals.

Following briefing and oral argument, the court of appeals certified the case to the Wisconsin Supreme Court expressly acknowledging that "[s]ection 880.31 [the

conservatorship statute] does not address the power or capacity of a conservatee to dispose of his or her property." (App. 2, Certification at 4.) The court of appeals also concluded that it "is uncertain as to the authority of a conservatee to dispose of his or her property. The statute provides little guidance and the case law is not particularly helpful." (App. 2, Certification at 8.) Accordingly, the court of appeals requested that the supreme court accept jurisdiction to "make the policy decision" that this case required. (App. 2, Certification at 8-9.) The Wisconsin Supreme Court refused certification on October 8, 1985.

On November 20, 1985, the court of appeals issued its decision reversing the trial court and directing judgment in favor of the plaintiffs, holding that a conservatee is legally incompetent to

dispose of her property without approval of the conservator or the conservatorship court, yet acknowledging its decision interpreting the conservatorship statute is anomalous with other Wisconsin statutes. Zobel v. Fenendael, 127 Wis. 2d 382, 395, 396, 379 N.W.2d 887 (Ct. App. 1985). (App. 1 at 20-22.) On December 20, 1985, following the appellate court's reversal of the trial court's judgment, the Fenendaels petitioned the Wisconsin Supreme Court for review of the November 20, 1985 decision of the court of appeals. The supreme court denied review April 8, 1986. (App. 4.) A notice of appeal was filed with the Clerk of the Wisconsin Court of Appeals, District II and the Clerk of the Wisconsin Supreme Court on July 3, 1986. (App. 5.)

The Fenendaels appeal to the United States Supreme Court pursuant to 28

U.S.C. § 1257(2), because the Wisconsin Court of Appeals' decision is repugnant to the Fourteenth Amendment of the Federal Constitution and is contrary to the fundamental rights guaranteed by Article I, section 1 of the Wisconsin Constitution. (The constitutional provisions are fully set forth in the appellants' appendix as App. 7.) The Wisconsin decision curtails heretofore recognized rights of a conservatee to dispose of property and in so doing deprives a conservatee (and in this case the appellants) of both procedural and substantive due process of law contrary to the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. (App. 7.) The Wisconsin decision is also repugnant to one's fundamental right to dispose of property as guaranteed by Article I, section 1 of the Wisconsin Constitution. (App. 7) E.g., Will of

Szperka: Olsewski v. Borek, 254 Wis. 153, 157-58, 35 N.W.2d 209 (1948); Ball v. Boston, 153 Wis. 27, 31-32, 141 N.W. 8 (1913); In re Estate of Eisenberg, 90 Wis. 2d 620, 624, 280 N.W.2d 359 (Ct. App. 1979). Moreover, Wisconsin's conservatorship statute (section 880.31) contains no restrictions whatsoever regarding the legal capacity of a conservatee to dispose of property. (App. 7 at 204.) Accordingly, the court of appeals' decision, after the death of the conservatee, retrospectively requiring the approval of the conservator or the conservatorship court to "validate" a conservatee's disposition of property, effects a procedural and substantive deprivation of the conservatee's heretofore recognized rights to dispose of property and the property rights of the donee. U.S. Const. amend XIV, § 1; Wis. Const. art.

I, § 1. (App. 7.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are U.S. Constitutional amendment XIV, Wisconsin Constitution, article I, section one and Wisconsin's Conservatorship Statute found in the Wisconsin Statutes section 880.31. The foregoing constitutional and statutory provisions are fully set forth in the appendix to this jurisdictional statement. (App. 7 at 2-4.)

STATEMENT OF THE CASE

A. Factual Background

The parties involved in this case include the guardians of Lillian Zobel (now deceased) who, as a conservatee, had gifted her home to the defendant Gloria Fenendael, by forgiving the balance due on the land contract with which Gloria Fenendael and her husband had purchased

the home. The guardians commenced this action to foreclose on the land contract challenging the validity of the gift solely on the claim Lillian Zobel was mentally incompetent at the time of the transaction. At the time of the gift Miss Zobel was a conservatee but by the time the case was tried to a jury several years later, she was subject to a guardianship (in an independent proceeding) and this suit was brought by her guardians, Herbert Hancox and Helen Hancox (ostensibly on her behalf but contrary to her expressed interests). [2]

This case was tried to a jury in May of 1984. The following facts were presented to the jury and give rise to

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2 Accordingly, this action is brought on behalf of Lillian Zobel by Herbert Z. Hancox and Helen W. Hancox, her guardians, as plaintiff versus Lee Fenendael and Gloria Fenendael as the defendants and donees of Miss Zobel's gift.

the issues on appeal. [3] Gloria Fenendael first met Lillian Zobel when Gloria was a practical nurse and Lillian hired her to care for her invalid sister in the Zobel home in Ripon, Wisconsin. 42/399. [4] Following the death of her sister in February of 1976, Lillian Zobel and Gloria Fenendael continued their friendship and developed a deep fondness for each other. 42/127-28. Lillian Zobel had no remaining relatives in Ripon. 42/401.

When Lillian Zobel decided to sell her home in 1979, Gloria Fenendael and her husband indicated an interest in

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[3] The facts of the case are not in dispute and are contained in the trial court transcript.

4 References to the trial transcript are provided by citation to its designation (as #42) in the Wisconsin court's compilation of the appellate record. Accordingly, the specific page number follows the record notation. (e.g., 42/399).

buying it. Lillian Zobel instructed her attorney to structure the sale to the Fenendaels at a price they could afford saying "I want Gloria to have the house." 42/213-14. Since the purchase price of $57,500 was closer to the appraised value of the home but $10,000 more than the Fenendaels could afford, Lillian Zobel directed her attorney to provide for a purchase price of $57,500, with $12,375 to be paid at the time the land contract was executed and at the same time to arrange for a $10,000 gift from Lillian Zobel to the Fenendaels to be applied toward the down payment. 42/223-25, 229, 230. Lillian told her attorney he should keep the $10,000 gift to the Fenendaels confidential and not tell her relatives (including her nephew, Herbert Z. Hancox). 42/225, 226. The land contract provided it was to terminate four years from the date signed

or six months from Lillian Zobel's death, whichever occurred first. In September of 1981, Lillian Zobel experienced failing physical health and she became concerned that if she were to die leaving Gloria Fenendael only six months within which to finance the balance on the land contract, Gloria could not afford to keep the house because of high interest rates. 42/232, 233. Lillian therefore instructed her attorney to amend the land contract to allow two years following her death within which to pay the balance. 42/233-36. Her attorney testified this amendment to the land contract was a continuation of Lillian Zobel's desire that Gloria Fenendael be able to keep the house. 42/238.

After learning of the amendment to the land contract, Lillian Zobel's nephew, Herbert Hancox of Fort Worth, Texas, came to Wisconsin and retained an

attorney in late November of 1981. 42/343-44. That attorney wrote a new will for Lillian Zobel which she executed on December 16, 1981. 42/345. On the same date, through arrangements made by the same attorney, Mr. Hancox was appointed as Lillian Zobel's conservator. 42/349-51.

In early 1982 Lillian Zobel learned that Gloria Fenendael and her husband had separated and were considering selling their interest in the house because Gloria would be unable to keep up the payments. 42/437-38. Lillian Zobel then summoned her lawyer and advised him she wanted to forgive the balance of the land contract and make a gift of the home to Gloria Fenendael. 42/241. In an extended conference between Lillian Zobel and her attorney on March 8, 1982, Lillian explained to her attorney her reasons for wanting to give Gloria the

house. Lillian and her attorney reviewed the balance in a trust fund in New Jersey from which Lillian received income. 42/242. Lillian told her attorney that Herbert Hancox, her conservator, would not like the fact that she was forgiving the balance on the land contract, but Lillian insisted she wanted to give the house to Gloria and she wanted to get it done with. 42/242-44. The hospital business manager who notarized the deed by which Lillian Zobel forgave the Fenendaels the balance on the land contract also questioned Lillian Zobel on March 8, 1981 concerning how Herbert Hancox would feel about it. Lillian Zobel responded by saying that it was her money, that she could do what she wanted with it and that she wanted Gloria to have the house. 42/84, 85.

Lillian's lawyer, Attorney Schrank, testified that while reviewing the deed

with Lillian on March 8, prior to executing the document, Lillian pointed out to him that the document he had prepared conveyed the property both to Gloria and Lee Fenendael and it was her intention to convey the property only to Gloria Fenendael because of the Fenendaels' contemplated divorce. He redrafted the document accordingly and it was executed on March 9, 1982. 42/248.

All of the people connected with the execution of the document testified at trial that Lillian Zobel fully understood what she was doing when she signed the deed forgiving the balance of the land contract.

Dr. Robert House, Lillian Zobel's personal physician, saw her on a daily basis in the hospital. He testified from his own entries in the hospital record on March 9, 1982 that Lillian had requested a visit from her attorney concerning the

disposition of her home and that she was "lucid" in her presentation of her gratitude toward Gloria Fenendael and what she wanted to do. 42/157. He testified that in his opinion Lillian understood and intended the transaction of March 9, 1982 and that her comments in explaining her desires in this respect were "clear and made sense and were consistent." 42/159. Lillian Zobel's lawyer testified he was absolutely satisfied Lillian Zobel knew what she was doing when she executed the document. 42/263. Joan Kennedy, the hospital business manager who notarized Lillian Zobel's signature on the deed, testified from her own personal notes that she "wanted to be sure" Lillian "knew exactly what she was signing" and that she "posed many different questions to her." 42/84. Joan Kennedy then reviewed all of the ramifications of the transaction with

Lillian to satisfy herself Lillian fully understood the amount involved and the significance of forgiving the balance on the land contract. 42/85-88. She had Lillian Zobel explain to her in her own words what she was doing in executing the document. 42/90. Joan Kennedy testified that in her opinion, when Lillian Zobel signed the deed forgiving the balance on the land contract on March 9, 1982, she understood exactly what she was signing. 42/99. Joanne Pearson, one of the witnesses to Lillian Zobel's signature on the March 9, 1982 document, is a licensed practical nurse and had daily contact with Lillian Zobel in the hospital. She testified Lillian Zobel was very competent (42/118) and that it was "clear that she wanted Gloria to have the house" (42/122). The other witness to Lillian's signature, Bonnie Howell, also a nurse, testified that at the time

in question Lillian Zobel knew what she wanted, that she was precise and competent and that when she signed the document she understood what she was doing. 42/130-32. A number of other hospital employees testified to Lillian Zobel's alertness and competence during the time in question. 42/124-27, 134-43.

Within three days after the deed was signed but before it was delivered to Gloria Fenendael, Lillian Zobel's attorney notified the Hancoxes' attorney that Lillian had signed a deed forgiving the Fenendaels the balance due on the land contract. He explained the circumstances surrounding Lillian's desire to make the gift to Gloria Fenendael and the circumstances surrounding the actual execution of the document. 42/265-66. On that same day Lillian's attorney conferred with Judge Eugene McEssey, the presiding judge in

the conservatorship proceeding. He advised Judge McEssey of the document Lillian Zobel had signed and the reasons for it. He also requested that the court interview Lillian Zobel concerning her determination to make the gift. 42/266. No action was taken by the judge of the conservatorship court nor did the conservator, Herbert Hancox, who had been notified of the Zobel gift, challenge the gift in the conservatorship court.

Upon the evidence received at trial, the jury found that Lillian Zobel was mentally competent at the time she executed the deed on March 9, 1982.

At the close of the plaintiffs' case at trial the Hancoxes raised (for the first time) the issue of legal incompetence, claiming that Miss Zobel's status as a conservatee legally barred her from disposing of her property. Since the plaintiffs, though informed of

the gift, had not challenged it in either the conservatorship or guardianship proceedings and had brought the case to trial only on the issue of mental competency, without raising the legal issue of the effect of the conservatorship either in their pleadings or by motion as required by statute, the trial court ordered that the trial proceed to verdict on the issue of mental competency. The jury rendered a verdict in favor of the defendants, finding that Lillian Zobel was mentally competent at the time of the transaction in question.

On motions after verdict, the trial judge held there was no existing law in Wisconsin legally barring a conservatee from disposing of her property and, based upon the jury's finding of mental competence, entered judgment on the verdict in favor of the Fenendaels. (App. 3, Decision at 18-19.) [5] The

plaintiffs appealed to the Wisconsin Court of Appeals, District II, which, after briefing and oral argument, certified the case to the Wisconsin Supreme Court requesting its guidance because of its uncertainty on the issue of a conservatee's legal right to dispose of property. Wisconsin Court of Appeals Certification to the Wisconsin Supreme Court at 8 (citing Wis. Stats. § 880.31). [6] The Wisconsin Supreme Court refused certification. The Court of Appeals reversed the trial court and held, for the first time in Wisconsin

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5 The trial court rendered its written decision on motions after verdict (hereinafter referred to as "Decision") which appears in the appellants' attached appendix as App. 3.

6 The Wisconsin Court of Appeals, District II, certification requesting that the Wisconsin Supreme Court accept jurisdiction is hereinafter referred to as "Certification" and is included in the appellants' attached appendix as App. 2.

that a conservatee is legally precluded from gifting her property. Zobel v. Fenendael, 127 Wis. 2d 382, 396, 379 N.W.2d 887 (Ct. App. 1985) (App. 1 at 20-22.) Between the time of the trial and the appeal to the Wisconsin Court of Appeals, Lillian Zobel died. The defendants-respondents petitioned the Wisconsin Supreme Court for review which was denied on April 8, 1986. (App. at 4.) Accordingly, the Fenendaels (the defendants) appeal to the United States Supreme Court from an adverse decision of the Wisconsin Court of Appeals, District II, finalized by the Wisconsin Supreme Court's denial of their petition for review.

B. Procedural facts regarding failure to raise legal issue of whether the gift was void because of the conservatorship

It is uncontroverted the plaintiffs never raised the issue of the legal

effect of the conservatorship on the transaction before trial in their pleadings or by motion. In their complaint, filed September 24, 1982, the plaintiffs challenged the March 9, 1982 transaction only on the grounds that Lillian Zobel was not competent to enter into that transaction. The complaint made no reference to the conservatorship. No summary judgment or other pre-trial motion was brought by the plaintiff referring to the legal effect of the conservatorship on the March 9, 1982 transaction. The pleadings, discovery and trial preparation related solely to whether Lillian Zobel was either mentally incompetent or unduly influenced [7] at the time in question.

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7 At the trial the plaintiffs withdrew the claim of undue influence.

Wisconsin's conservatorship statute expressly provides that "[a]ppointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered." Wisconsin Statutes § 880.31(6) (emphasis supplied) (App. 7 at 4.) Accordingly, there was nothing in Wisconsin statutory or case law requiring or even suggesting that a conservatee was legally incompetent to dispose of her property. Moreover, the Hancoxes and their attorney did not obtain a hearing before the court presiding over the conservatorship or the court presiding over the subsequent guardianship seeking to nullify the March 9, 1982 transaction. The court in the conservatorship and guardianship proceedings neither approved nor disapproved the transaction in issue. 42/343.

During the trial, after the plaintiffs had rested and after the defendants had presented a substantial portion of their case, the plaintiffs, for the first time, moved the court to hold that the transaction in question was void as a matter of law because of the conservatorship. 42/384. Following the verdict the plaintiffs moved to amend the pleadings to assert Lillian Zobel's legal incapacity to enter into the transaction because of the conservatorship and for judgment notwithstanding the verdict on the same grounds. These motions were denied by the trial court and judgment was ordered in favor of the donee, Gloria Fenendael.

C. Statement on raising of questions sought to be reviewed

There was no occasion or need to raise the constitutional issues sought to be reviewed herein in the trial court

because the plaintiff's complaint and evidence at trial challenged the transaction in question only on the grounds of mental incompetency and the trial court accepted defendants' argument that the post-trial challenge to the transaction on the grounds of legal incompetency because of the conservatorship was not timely raised. This issue was raised in the trial court in the Fenendaels' brief in support of their motion for judgment on the verdict, in which they argued that because of the plaintiff's failure to raise the issue that the transaction was void because of the conservatorship in pleadings or by pretrial motion and the failure to challenge the transaction either in the conservatorship or guardianship proceedings, the Fenendaels were deprived of timely notice and opportunity to meet that issue. The trial court agreed with

this contention and found that the defendants had been prejudiced by the plaintiff's failure to raise this issue in a timely manner. App. 3, Decision at 13.

Nor was there necessity or occasion to specifically raise these constitutional issues in the Wisconsin Court of Appeals since that court had not yet voided the transaction effecting the deprivation of rights without due process sought to be reviewed in this appeal. These issues were raised in the Wisconsin Court of Appeals in the Fenendaels' brief in which they argued that the trial court properly ruled they had been prejudiced by the failure of the plaintiffs-appellants to timely notify the defendants-respondents of their challenge to the conservatee's legal competency to gift the property because of the conservatorship. In their brief to the

Wisconsin Court of Appeals the defendants-respondents also cited and referred to the fundamental civil right of an individual to dispose of property that would be defeated if the trial court were not affirmed. The Wisconsin Court of Appeals, by its decision of November 20, 1985, reversed the trial court and voided the gift thus effecting the deprivation of rights sought to be reviewed herein.

The defendants-respondents did specifically raise the issues sought to be reviewed herein in their December 20, 1985 petition to the Wisconsin Supreme Court to review the decision of the Wisconsin Court of Appeals. (App. 6.) Among the reasons presented by the defendants in their petition for review was the argument that the decision by the Wisconsin Court of Appeals voiding the gift on the grounds that the donor was a

conservatee at the time of the gift effected an unconstitutional deprivation of rights without due process. (App. 6.) The Wisconsin Supreme Court did not address either these or any other issues raised in the petition for review and denied review in its order of April 8, 1986.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. A competent conservatee and her donee have been deprived of constitutionally guaranteed rights without due process when an appellate court voids the conservatee's gift after her death because she was subject to a conservatorship, where state law permitted such a gift at the time it was made and neither the conservatee nor the donee were given timely notice the gift would be challenged even though the conservator and the court were notified of the gift.

A conservatorship is a creature of statute which is the sole source of authority establishing the rights and duties of the conservator, the conservatee and the conservatorship

court. Wis. Stats. § 880.31. (App. 7 at 2-4.) The conservatorship process is voluntary and the statute expressly states that "[a]ppointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered. Wis. Stats. § 880.31(6) (emphasis supplied) (App. 7 at 4.)

At the time of the gift, there was no existing Wisconsin law restricting the powers of a conservatee to dispose of property. See Certification at 6. (App. 2.) Accordingly, when Lillian Zobel decided to forgive the balance due on the land contract, directed her lawyer to draft the documents to effect the gift and executed those documents, neither she nor her lawyer had reason to believe she was legally ineligible to do so. Both the conservator and the conservatorship court were informed of the gift shortly

after it occurred. Yet, from the time of the gift through the time Lillian Zobel was later declared incompetent in the guardianship proceedings arranged for by the Hancoxes, no one questioned Lillian Zobel's legal capacity, as a conservatee, to make the gift. Through the time of Lillian Zobel's death, the law applied by the trial court, permitting a competent conservatee to dispose of her own property, remained the law of Wisconsin.

No approval was necessary from the conservators or the conservatorship court and the conservators chose not to challenge the validity of that transaction before the conservatorship court. Instead, they chose the forum of the circuit court in a foreclosure action nearly five months later to invalidate

the gift on the grounds of mental incompetency and undue influence. [8]

The court of appeals decision voiding the gift after the death of the conservatee by holding, retrospectively, that even a competent conservatee cannot dispose of property outside the conservatorship, defeated the pre-existing right of the conservatee to dispose of her property and the property rights of the donee with neither having had the notice and opportunity for a hearing required by the Due Process Clause. U.S. Const. amend. XIV. This court has repeated that:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or

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8 There was no evidence whatsoever to support the undue influence claim and the plaintiffs witndrew it at the close of their case.

> property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Logan v. Zimmerman Brush Co., 445 U.S. 422, 428 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Even if court approval should be regarded as necessary to a valid gift on the part of a conservatee, the trial court's judgment in this case vesting title of the real estate in Gloria Fenendael's name constituted such approval. The evidence in the record established that the conservatee could afford, financially, to forgive the balance due on the land contract and that it was her well-considered and competent intent to do so. Had the conservatee or the donee been given timely notice of the need to do so, they could have presented this same evidence to the conservatorship court.

They could have presented testimony of her conservators' selfish motives in attempting to invalidate the transaction, submitting the matter for the court's approval in March of 1982. Moreover, had the conservatorship court failed to approve the transaction, Miss Zobel could have petitioned the conservatorship court to terminate her conservatorship pursuant to section 880.31(4), and gifted the property to the Fenendaels upon termination of her conservatorship. (App. 7 at 3.)

Without any notice or an opportunity for hearing, the conservatee was deprived of her right to dispose of her property, resulting in the court of appeals undoing what she had clearly intended to do in gifting her property. Miss Zobel and the Fenendaels have been denied their due process rights with no remedy whatsoever since Miss Zobel is now deceased. There

can be no accommodation of these rights if this decision is affirmed.

The court of appeals' decision effectively permitted the conservatee and the donee to be trapped out of their rights. The conservatee competently intended and effected a gift valid under the then existing law, and then timely notified the conservator and the conservatorship court even though such notice was not required by Wisconsin Law. The court of appeals' decision reversing the trial court and voiding the gift after the conservatee's death on an ex post facto basis destroyed fundamental rights which could have been protected had the conservatee or the donee been given timely notice or opportunity. This court has stated:

> To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an

> opportunity to present his claim of entitlement.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Bell v. Burson, 402 U.S. 541 (1971).

The necessity for review by this court is particularly urgent here because the intermediate state appellate court that voided the gift did so with acknowledged uncertainty, effecting an admittedly harsh result inconsistent with state statutes; and the highest court of the state refused both a pre-decision request for guidance and post-decision review. (See Certification, App. 2.) Unless reviewed, the deprivation of rights caused by the appellate court's decision will be final.

The court of appeals did not remand the matter to the trial court for further proceedings. Zobel v. Fenendael, 127 Wis. 2d, n.13 at 396, 379 N.W.2d 887 (Ct.

App. 1985) (App. 1 at 28-29). It simply voids the transaction retrospectively, reversing the judgment entered on the jury's verdict. Id. at 395 (App. 1 at 22).

II. SINCE THE STATE SUPREME COURT REFUSED TO REVIEW THE UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS CAUSED BY THE STATE INTERMEDIATE APPELLATE COURT DECISION, AN APPEAL TO THE UNITED STATES SUPREME COURT CONSTITUTES THE ONLY AVAILABLE APPELLATE REVIEW. UNDER THE CIRCUMSTANCES OF THIS CASE, THIS COURT SHOULD REVERSE THE ORDER OF THE INTERMEDIATE APPELLATE COURT OR, AT LEAST, REMAND THE CAUSE TO THE WISCONSIN SUPREME COURT FOR REVIEW PURSUANT TO 28 U.S.C. § 2106.

The trial court, applying existing Wisconsin Law, which did not limit a conservatee's right to dispose of property, entered judgment in Gloria Fenendael's favor based on the jury's finding of Lillian Zobel's competence at the time of the gift.

The defeat of Lillian Zobel's right to dispose of her property and the

deprivation of Gloria Fenendael's ownership of that property, all without due process, occurred when the Wisconsin intermediate appellate court, after Lillian Zobel had died, reversed the trial court, voided the gift and ordered judgment of foreclosure in favor of the guardians. Following the adverse decision of the intermediate appellate court, Gloria Fenendael timely filed with the Wisconsin State Supreme Court a petition for a review of the intermediate appellate court's decision pursuant to Wisconsin Statutes section 809.62. In that petition, she raised the constitutional issues presented by the intermediate appellate court's decision and petitioned the Wisconsin State Supreme Court to consider whether, under the circumstances of this case, the intermediate appellate court's decision resulted in an unconstitutional

deprivation of fundamental rights without due process. (See portion of petition for review in appellants' appendix, App. 6.) This reason for review by the supreme court was additional to other stated grounds warranting review, including the reasons that the intermediate court of appeals, in its attempt at certification to the state supreme court, had expressed uncertainty and the need for supreme court guidance on the issues involved, that the intermediate appellate court acknowledged the harshness of its decision and its inconsistency with other existing state statutes and the fact that in its decision, the intermediate court was enunciating a new policy regarding conservatorships, a function ordinarily reserved for the state supreme court. But the Wisconsin Supreme Court refused to review the decision of the

intermediate appellate court and, since a rehearing on a denial of a petition for review to the state supreme court is not permitted (Archdiocese of Milwaukee v. City of Milwaukee, 91 Wis. 2d 625, 627, 284 N.W.2d 29 [1979]) the decision of the intermediate appellate court became final. Accordingly, we must look to the United States Supreme Court as the only available body for appellate review of the issues raised herein.

In addition to and, perhaps, as part of the constitutional basis for appellate review by this court, this case falls within the jurisdictional principles stated by this court in Minnesota v. National Tea Co., 309 U.S. 551 (1940) as follows:

> This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as

> justice requires . . . That principle has been applied to cases coming from state courts where supervening changes had occurred since entry of the judgment . . . and where the grounds of the state decision were obscure. . . .
>
> But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of the state action.

Id. 555, 557. (Emphasis supplied). As stated above, the intermediate appellate court's decision voiding the gift solely because of Lillian Zobel's status as a conservatee represents a change from the law both as of the time of the transaction in question and the time of the judgment entered by the trial court. The ambiguity and obscurity of the intermediate appellate court's adjudication herein is demonstrated by that court's own acknowledgment that its decision is "anomalous" with other

statutes in related areas.
(Certification, App. 2 at 8.)

Under the intermediate appellate court's decision, a gift by a competent conservatee outside the conservatorship is void even where such a gift is well-considered and the conservator objects to the gift out of selfish motivation or for other reasons contrary to the interests of the conservatee. Certainly, Wisconsin Statutes section 880.31, the statute creating conservatorship proceedings and the only statute discussing the powers and authorities of conservators and conservatees does not render void a gift such as Lillian Zobel made in this case. Further, the only Wisconsin appellate decision prior to this case discussing conservatorships held it should not be necessary for a conservatee to terminate the conservatorship, make the desired disposition of property and

then re-establish the conservatorship in situations where the conservatee desires to dispose of property outside the conservatorship. Estate of Evans, 28 Wis. 2d 97, 101, 135 N.W.2d 832 (1965).

Equally important is the precise anomaly acknowledged by the Wisconsin Court of Appeals as being caused by its decision. (Certification, App. 2 at 8.) Under Wisconsin Statues section 880.215, relating to limited guardianships, wherein a ward is presumed incompetent, "the validity of a contract made by a person under limited guardianship is not void, however, unless the determination is made by the court in its findings under section 880.33(3) that the ward is incapable of exercising the power to make contracts." (Emphasis supplied). Further, under section 880.33(3), a ward in a limited guardianship is allowed to convey property.

Thus, under the court's decision, the personal freedom of a conservatee (not presumed incompetent under the conservatorship statute) is more limited that that of a ward in a guardianship wherein incompetency is presumed. Considering the only Wisconsin statute dealing with conservatorships, the only other Wisconsin appellate decision discussing conservatorships and the fact that under Wisconsin limited guardianship statutes, transfers of property by a ward are not void but only voidable upon a showing of factual incompetency, this decision by the Wisconsin intermediate appeals court, refused to be reviewed by the state supreme court, is contrary to the "body" of related Wisconsin law. When this court has found a portion of a body of state law, as interpreted or applied by a state court, to be offensive to the Due Process Clause it has remanded

the cause back to the state supreme court so that the state supreme court is given an "opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it." Musser v. State of Utah, 333 U.S. 95, 97, 98 (1948).

CONCLUSION

We would hope that on accepting this appeal this court would reverse the Wisconsin Court of Appeals' decision and reinstate the judgment of the trial court so that the competent, intended disposition by Lillian Zobel of her own property and the property rights of Gloria Fenendael are preserved. At least, we would seek in this appeal to have the cause remanded to the Wisconsin Supreme Court which should have exercised its appellate jurisdiction for the reasons stated above.

A dismissal of this appeal would mean that Gloria Fenendael will have had no appeal from the voiding of the gift effected by the decision of the Wisconsin intermediate court of appeals. To avoid this injustice we ask this Court to accept this appeal at least to follow the procedure used by this court in Missouri, ex rel Wabash Railway Company v. Public Service Commission, 273 U.S. 126 (1927) wherein this Court in remanding the cause back to the state court for further proceedings noted:

> While this court may decide these questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court. . . . In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, since a dismissal of this appeal might leave the judgment to be enforced as rendered.

Id. at 131. Accordingly, and in conclusion, we appeal to this Court at least to remand this case for proper appellate review back to the Wisconsin Supreme Court which once stated:

> There is the high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or will, - holds. It is not the business of courts to undo what an old person may have done with his property, because of judicial notions of propriety or moral obligations, in a case of this sort, or the wishes of relatives, however deserving. Did the man do freely what he wanted to do and was competent to decide upon? These are the sole questions.

In re Estate of Bauer, 264 Wis. 556, 561, 59 N.W.2d 481 (1956) (quoting Boardman v. Lorentzen, 155 Wis. 566, 579, 145 N.W. 750 (1915).

Dated at Milwaukee, Wisconsin, this 3rd day of July, 1986.

Respectfully submitted,

E. Campion Kersten
Kenan J. Kersten
Ann L. Muchin
Louis R. Ullenberg

Kersten & McKinnon
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 271-0054

Louis R. Ullenberg
724 East Euclid Avenue
Milwaukee, Wisconsin 53207
(414) 744-4289

No.

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1985

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

v.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

CERTIFICATE OF SERVICE

I, E. Campion Kersten, a duly licensed attorney at law admitted to the Bar of the United States Supreme Court, hereby certify that three true and correct copies of the appellants' jurisdictional statement, including a certificate of interested persons and the appendix to the jurisdictional statement, were served, pursuant to Rule 28, by

depositing the foregoing documents in a United States Post Office or Mailbox in Milwaukee, Wisconsin, with first-class postage prepaid, this 7th day of July, 1986 addressed to the appellee's counsel of record at his post office address as follows:

David J. Colwin, Esquire
Colwin, Fortune, Colwin,
Pomeroy & English
201 South Marr Street
P. O. Box 1476
Fond du Lac, Wisconsin 54935

_____
E. Campion Kersten

Subscribed and Sworn to
before me this 7th day
of July, 1986.

_____
Notary Public, State of Wisconsin
My commission _____.

(2)

86-150

Supreme Court, U.S.
FILED
JUL 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

v.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

On appeal from the Wisconsin Court of Appeals, District II, following a denial of review by the Wisconsin Supreme Court

---

APPENDIX TO JURISDICTIONAL STATEMENT

E. Campion Kersten
Kenan J. Kersten
Ann L. Muchin
Louis R. Ullenberg

Kersten & McKinnon
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 271-0054

Louis R. Ullenberg
724 East Euclid Avenue
Milwaukee, Wisconsin 53207
(414) 744-4289

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STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

DECISION of November 20, 1985 No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Fond du Lac county: JOHN P. McGALLOWAY, JR., Judge.

Reversed and cause remanded.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

NETTESHEIM, J. Herbert and Helen Hancox, guardians of Lillian Zobel, appeal from a judgment entered following a jury trial dismissing their complaint which sought to void a gift by deed executed by Zobel to Lee and Gloria Fenendael. The jury determined that

Zobel was competent at the time she made the gift.

During trial, the Hancoxes sought to amend their complaint to conform to certain evidence which showed that Zobel executed the deed while she was subject to a conservatorship. The Hancoxes claimed that Zobel's gift was void, as a matter of law, since it was made without the approval of the conservator or conservatorship court. The trial court denied the motion to amend the pleadings. We conclude the denial of the motion was an abuse of discretion since no surprise or prejudice to the Fenendaels is demonstrated. We also conclude, as a matter of law, that a conservatee lacks the capacity to make a gift without the approval of the conservator or the conservatorship court. Therefore, we reverse and remand with instructions to allow amendment to

the pleadings and to enter judgment in favor of the Hancoxes.

On December 20, 1979, Lillian Zobel sold her house on a land contract to the Fenendaels. In November, 1981, Zobel petitioned the circuit court for the appointment of a conservator of her estate. The conservatorship court appointed the Hancoxes as conservators of Zobel's estate. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March, 1982, Zobel executed a deed to the Fenendaels in satisfaction of the balance of the land contract. She did not inform the Hancoxes or the conservatorship court of the pending transaction nor seek their approval of the gift. [1]

The amended complaint upon which the jury trial was conducted alleged that

Zobel was not competent to make the gift by deed in March 1982. [2] Based upon these allegations, the Hancoxes sought foreclosure of the land contract. During the course of the Hancoxes' case-in-chief, testimony and documentary evidence established that Zobel was subject to the conservatorship at the time she executed the March 1982 deed in satisfaction of the land contract.

At the close of the Hancoxes' case, the trial court judicially noticed the conservatorship and guardianship file regarding Zobel. The Hancoxes moved for leave to amend their pleadings to include "the defense that the gift was not approved either by the conservator or the court." [3] Based upon this amendment, the Hancoxes then requested judgment as a matter of law contending that Zobel, as a conservatee, lacked the capacity to make a gift. The trial court took the motions

under advisement and stated that it would proceed to take a verdict.

At the close of the evidence, the Hancoxes again moved to amend their amended complaint to conform to the evidence and for judgment. The trial court again deferred ruling on the motions until a verdict was obtained. By decision on motions after verdict, the trial court denied the motion to amend the pleadings. The trial court's decision also, however, determined that the approval of the conservator or the conservatorship court was not required to render Zobel's gift effective. [4]

The Fenendaels rely upon sec. 802.06(2) and (4), Stats., which provides, in part:

> (2) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the

> responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion ....
>
> (4) The defenses specifically listed in sub. (2), whether made in a pleading or by motion, . . . shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred until the trial. [Emphasis added.]

This statute, however, does not apply to complaints. It is limited, on its face, to defenses asserted in a responsive pleading. Therefore, the Fenendaels' reliance on this statute and the related line of cases they cite is misplaced. [5]

Rather, the governing statute is sec. 802.09(2), Stats. The most complete discussion and analysis of this statute is contained in State v. Peterson, 104 Wis. 2d 616, 312 N.W.2d 784 (1981). Peterson bifurcates the statute into two parts governing two different fact

situations. The first addresses a situation where the issues are tried by the express or implied consent of the parties:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues ....

Sec. 802.09(2). This part of the statute appears to be mandatory; if the trial court concludes that the parties consented to the trial of the issues, the court must conform the pleadings to the proof. Peterson at 629, 312 N.W.2d at 790.

The second addresses a situation where an objection is made at trial that

the evidence offered is not within the issues raised by the pleadings. Id.

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objection party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Sec. 802.09(2), Stats. When objection is made, the statute grants the court discretion to allow the amendment and encourages the court "to do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining the ... defense upon the merits." Peterson

at 629-30, 312 N.W.2d at 790-91.

Our reading of the entire record in this case reveals that the existence of the conservatorship was alluded to scores of times without objection. Documentary evidence establishing the existence of the conservatorship was stipulated into evidence. At various stages in the proceedings, the Fenendaels themselves put in evidence concerning the conservatorship. The record reveals, by our court, seventeen references to the conservatorship by either the Hancoxes or the Fenendaels before the Fenendaels objected on the relevancy and pleading grounds asserted on this appeal. Under these circumstances, we conclude that the Fenendaels did not timely object to the proofs submitted. Therefore, we analyze the issue on the motion to amend the pleadings as one governed by the first portion of sec. 802.09(2), Stats. This

requires us to determine whether the issues relating to the conservatorship were tried by the express or implied consent of the parties.

Here, there was no express consent. [6] Thus, if the Fenendaels consented to trial of the conservatorship issues, the consent must be implied.

Whether an issue has been tried by implied consent is to be determined by the circuit court; the circuit court must make findings on the issue of consent, because once consent is found, the circuit court has no choice but to amend the pleadings. Peterson at 631, 312 N.W.2d at 791. Here, the circuit court did not make any findings that there was -- or was not -- implied consent. We are thus faced with the issue of whether we can on the basis of the record before us determine whether, as a matter of law, the Fenendaels understood, were aware of,

or had actual notice that the issue of Zobel's legal capacity as a conservatee was being raised by the evidence concerning the conservatorship. See id.

Implied consent is generally held to exist where there is no objection to the introduction of evidence on the unpleaded issue and where the party not objecting is aware that the evidence goes to the unpleaded issue; actual notice to the parties appears to be the key factor in determining whether there was implied consent. Id. at 630, 312 N.W.2d at 791. As noted above, the evidence concerning the conservatorship was admitted without timely objection. The more difficult question is whether the Fenendaels were aware that the conservatorship evidence went to the issue of Zobel's capacity to make a gift -- an unpleaded issue. In order to find implied consent, it must appear that the

parties understood the evidence was aimed at the unpleaded issue. Id. Because the evidence on the conservatorship issues was also relevant to the issue of Zobel's competency, the Fenendaels may not have been aware that the Hancoxes were raising a new unpleaded issue. Thus, we cannot conclude, as a matter of law, that the Fenendaels had actual notice that the evidence concerning the conservatorship went to the unpleaded issue. Therefore, the Fenendaels did not impliedly consent to the trial of such issue.

Our analysis does not stop at this point, however. This is because Peterson engrafts upon sec. 802.09(2), Stats., an "interests of justice" determination even after a finding that no implied consent to the trial of the unpleaded issue existed.

> If the evidence has been introduced without objection and the circuit court finds

> that there has been no actual notice, it should find that there has been no implied consent of the unpleaded issue. Under such circumstances, the circuit court may sua sponte under sec. 802.09(1), (2) amend the pleadings to conform to the evidence if the circuit court concludes that justice so requires. Amendment is thus within the discretion of the circuit court and the circuit court in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment.

Id. at 634, 312 N.W.2d at 793 (emphasis added). This "interests of justice" consideration is, essentially, a determination of prejudice. See id. at 635, 312 N.W.2d at 793. [7]

Although the supreme court in Peterson did not expressly state that the determination of prejudice in this context presents a question of law, we conclude that it does. We do so not only because the supreme court in Peterson

proceeded to address the question, but also because prejudice, in other contexts, has been held to present a mixed question of law and fact. State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

Here, the historical facts relating to the question of prejudice are undisputed. Thus, we are left with only the legal question as to whether prejudice exists. This court is not bound by a trial court finding based on undisputed evidentiary facts when the finding is essentially a conclusion of law. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985).

The trial court concluded that permitting the amendment to the complaint would prejudice the Fenendaels. However, the trial court did not specify in what respects such prejudice existed. [8] Upon

appeal, the Fenendaels opine that the granting of the motion would have prompted a need to present evidence establishing the "selfish motivation of the Hancoxes and Lillian Zobel's personal motives in going ahead with the transaction before telling the Hancoxes." But such testimony would have no bearing on the legal question of the capacity of a conservatee to make a gift without conservator or conservatorship court approval. The same holds true for the Fenendaels' claim that "the testimony of the judge in the conservatorship proceedings might have been presented." [9]

The amendment to the pleadings would simply have placed before the trial court the underlying legal question presented on this appeal as to whether a conservatee may make a gift of her property without approval of the conservator or her conservatorship

court. No prejudice is shown (and we can fathom none) by the granting of the amendment. The existence of the conservatorship was acknowledged by all parties. Its presence raised a legitimate legal question which the trial court addressed in its ruling on the motion for judgment notwithstanding the verdict. When the facts pertaining to the conservatorship were repeatedly addressed at trial without timely objection, we are at a loss to perceive any prejudice by granting a motion to amend the pleadings to conform to such evidence. [10]

Statutes governing amendment of pleadings are to be liberally construed to permit the presentation of the entire controversy providing such amendment does not unfairly deprive the opposing party of an opportunity to meet the new issue. Gustavson v. O'Brien, 87 Wis. 2d

193, 204, 274 N.W.2d 627, 633 (1979); Wipfli v. Martin, 34 Wis. 2d 169, 174, 148 N.W.2d 674, 677 (1967). Here, we do not see the requested amendment to the pleadings as unfairly depriving the Fenendaels of the opportunity to meet the relevant factual and legal issues presented by Zobel's status as a conservatee. Indeed, the trial court decision points to no such specific prejudice. Under these circumstances, the interests of justice required the granting of the amendment to the pleadings, despite the lack of actual notice to the Fenendaels. Peterson at 634, 312 N.W.2d at 793.

We now turn to the legal issue presented by the amendment to the complaint: Whether a conservatee requires the approval of either the conservator or the conservatorship court in order to make an effective gift of her

property. [11] We conclude she does.

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118. The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the

property of an incompetent person. Sec. 880.31(3). Section 880.31, however, does not address the power or capacity of a conservatee to dispose of his or her property.

Evans determined that a conservator had the authority to create a joint tenancy in certain of the conservatorship property when the transfer was sought by the conservatee and when approved by the conservatorship court. The Hancoxes argue that certain supreme court language in Evans always requires approval of the conservator or the conservatorship court before a conservatee can effectively act. "[I]n a conservatorship, where there is no adjudication that the applicant is incompetent, It makes sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection." Evans at 101, 135

N.W.2d at 834 (emphasis added). However, the facts in Evans are quite different from those here. In Evans, the conservator was directed to transfer the conservatee's property pursuant to the conservatee's petition and the conservatorship court's order. Here, the conservatee did not seek the prior approval of either the conservator or the conservatorship court. In fact, she expressly sought to circumvent both. In our certification to the Wisconsin Supreme Court we asked whether the intent of the Evans language was to require conservator or conservatorship court approval in all instances.

Although the appointment of a conservator is not evidence of the incompetency of the conservatee, and although a conservatee is not considered completely incapable of looking after his or her own property (Evans at 100), the

purpose of a conservatorship is to afford the protections akin to those provided by a guardianship but without the stigma of incompetency. See Evans at 100, 135 N.W.2d at 834. If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose.

If a conservatee wishes to rid himself or herself of the restrictions of a conservatorship, the statute supplies an avenue for relief.

> 880.31(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent,

> remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

We acknowledge that invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to be competent at the time of the gift. However, for us to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless. Such interpretations are to be avoided. See Johnson v. State, 76 Wis. 2d 672, 676, 251 N.W.2d 834, 836 (1977). [12]

We therefore reverse and remand this matter to the trial court with directions to grant the Hancoxes' motion to amend the complaint to conform to the evidence and to enter judgment upon the second amended complaint in favor of the

Hancoxes.

By the Court. -- Judgment reversed and cause remanded. [13]

Recommended for publication in the official reports.

APPENDIX

[1] It was only after these events that the Hancoxes were appointed Zobel's guardians.

[2] The amended complaint also challenged Zobel's competency to make a September 1981 amendment to the original land contract. This amendment predated the conservatorship. The jury found Zobel to be competent at the time she signed this amendment. This finding is not challenged upon this appeal.

The amended complaint also raised a claim of undue influence. This, however, was withdrawn at the close of the Hancoxes' case.

The parties agree that the jury issue of Zobel's competency goes to the question of her mental state and does not address the question of her "capacity" to make a gift while subject to a conservatorship.

[3] Technically, this was not a motion to amend to conform to the evidence under sec. 802.09(2), Stats., since the Hancoxes based their motion upon sec. 802.09(1) and (4). However, no prejudice is demonstrated by this failure to refer to the correct subsection since the Hancoxes' attorney indicated that his motion was to amend the pleadings to include the evidentiary references to the conservatorship. In addition, the reference to a "defense" was technically inaccurate since the Hancoxes' pleading was a complaint.

[4] This ruling was made in response to the Hancoxes' motion for judgment

notwithstanding the verdict. Thus, the trial court, despite denying the motion to amend the pleadings, nevertheless reached the legal issue of whether a conservatee could make an effective gift under these circumstances. However, upon appeal, neither party argues that the trial court's judgment notwithstanding the verdict ruling moots the issue concerning the amendment of the pleadings. Nor does either party address the interaction between the two procedural statutes. We choose therefore to address this case on the issue raised and briefed by the parties -- the propriety of the trial court's denial of the motion to amend the pleadings.

[5] Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979); Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984); Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975); Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964); Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d 651 (1975).

[6] Express consent may be given by stipulation, or may be incorporated in a pretrial order and rarely raises any serious fact question. State v. Peterson, 104 Wis. 2d 616, 630 n. 17, 312 N.W.2d 784, 791 (1981). See also 6 C. Wright and A. Miller, Federal Practice and Procedure - Civil § 1493, at 461-62 (1971).

[7] Peterson applied the prejudice determination in a situation where the court had acted sua sponte to amend the

complaint to conform to the evidence. Id. at 634, 312 N.W.2d at 793. We see no reason to fashion a different rule in a case such as this where as party has moved to amend a complaint to conform to the evidence. Were we to limit Peterson to only those cases where the court has acted sua sponte, a party who does not move to amend a complaint would receive the benefit of a prejudice determination, whereas a party who place the issue before the court would be denied this determination. This would result in an uneven and unreasonable application of the statute. Such an application is to be avoided. See State Central Credit Union v. Bigus, 101 Wis. 2d 237, 242, 304 N.W.2d 148, 150-51 (Ct. App. 1981). Moreover, when the supreme court fashioned the balancing test in Peterson, it was interpreting sec. 802.09(2), Stats., which contemplates a motion made by a party -- not the court.

[8] The trial court's finding of "prejudice" to the Fenendaels is actually more akin to a finding of laches against the Hancoxes. While a consideration of laches is certainly appropriate in this "balancing of interest proceeding," laches does not necessarily equate with prejudice.

[9] This gratuitously assumes that such testimony is admissible.

[10] The cases relied upon by the Fenendaels are inapposite. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), and its language relating to certain "tactics" on the part of the city attorney smack more of estoppel than prejudice. Moreover, the language is

dicta to the rule of the case which holds that the notice of claim given by the plaintiff was sufficient. It was upon this latter issue that he supreme court reversed the court of appeals -- not any finding or conclusion relating to the conduct of the city attorney.

Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975), also does not apply since the issue raised by the defendant upon appeal was not raised in his responsive pleadings.

Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964), was a summary judgment case in which the trial court rejected a proposed amended answer. Thus, Poehling is only a pleading case and decided only on the pleadings in which the defendant claimed a right to try its defenses seriatim; first by demurrer, then by a plea in abatement, and finally by an answer on the merits. Poehling is not an amendment of pleadings to conform to the evidence case.

The same is true for Trispel v. Haefer, 89 Wis. 2d 725, 279 N.W.2d 242 (1979), where the issue was whether a party should be permitted to amend its pleading for a third time after a failure with a pretrial order, despite a specific warning of a potential dismissal motion prompted by the party's questionable allegations in its original and amended complaints.

Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d

651 (1975), and Drehmel v. Radant, 75 Wis. 2d 223, 249 N.W.2d 274 (1977), are cases where the trial court found specific prejudice to the party against whom the motion was made and where wholly unrelated and new issues were injected into a proceeding. Metropolitan Sewerage District also dealt with a responsive pleading.

[11] We certified this issue to the Wisconsin Supreme Court on August 14, 1985. Certification was denied on October 8, 1985.

[12] The Fenendaels note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. They argue that it would be anomalous for the law to accord some respect for the unsupervised legal actions of an incompetent, but give none to a conservatee who is presumed competent. We acknowledge the anomaly but point out that this is an inconsistency more properly corrected by legislative, rather than judicial, action.

[13] We are aware that Peterson, having concluded that no prejudice inured to the defendant by virtue of the trial court amendment to the complaint, nonetheless remanded the case "to offer the parties an opportunity to submit additional evidence to ensure that the parties have a full opportunity to be heard on the issues litigated." Id. at 640, 312 N.W.2d at 795. Here, however, the Fenendaels have proffered to us the suggested evidence which they claim would have been offered in response to the

unpleaded issue. We have previously determined herein that such evidence is not relevant to the legal question presented by the requested amendment. In addition, we have attempted to discern other possible evidentiary material not suggested by the Fenendaels that could conceivably be relevant to this issue. We have discerned none.

Finally, this case was tried to a jury whereas Peterson was a trial to the court. Remand here for further evidentiary proceedings is impossible since the jury has been discharged.

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

CERTIFICATION of August 14, 1985
No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

May a conservatee make a gift of his or her property without the approval of the conservator or the court which ordered the appointment of the conservator?

FACTS

In November, 1981, Lillian Zobel petitioned the circuit court for the appointment of a conservator of her estate. The court appointed the appellants, Herbert and Helen Hancox as conservators of Zobel's estate. Prior to petitioning the court for the appointment of conservators, Zobel had sold her house on a land contract to the respondent, Gloria and Lee Fenendael. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March 1982, Zobel executed a deed in satisfaction of the land contract. Zobel did not inform the Hancoxes or he court of the pending transaction nor seek their approval prior to the execution of the deed.

The conservators, in an action to declare the deed void, claimed that Zobel, as a conservatee, lacked the capacity to make the gift without the approval of the conservators and/or the court. The trial court held that such approval was not necessary.

DISCUSSION

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118.

The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the property of an incompetent person. Sec. 880.31(3). Section 880.31 does not address the power or capacity of a conservatee to dispose of his or her property.

Here, the conservators rely on Evans to support their contention that a gift by a conservatee must have the approval of the conservators and the court. The question addressed in Evans, however, was "whether the trial court erred in authorizing the conservator to place the treasury notes owned by [the conservatee] in joint tenancy with others." Evans at 99, 135 N.W.2d at 833. The issue in

Evans, therefore, concerned the authority of the conservator to enter into a transaction and did not involve the authority of the conservatee to enter into transactions of dispose of property. Some language in Evans, however, suggests that the approval of the conservator and the court is necessary:

> Thus, a conservatee is not considered completely incapable of looking after his own property. A ward under guardianship is either a minor, incompetent, or a spendthrift. He is incapable of looking after his own property and it fits the statutory scheme for control of guardianships that the ward should not be able to control what should be done with his property. But in a conservatorship, where there is no adjudication that the applicant is incompetent, it makes sense to allow the conservatee freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection.

Evans at 100-01, 135 N.W.2d at 834

(footnote omitted; emphasis added). Given that the issue here was not directly before the court in Evans, we are uncertain whether Evans requires the approval of the conservator or the court before the conservatee makes a gift.

Nevertheless, the argument of the conservators is persuasive. As they point out, a conservatee is under the protection of the court because he or she is not able to properly manage his or her property. If the approval of the conservator or the court is not necessary for the conservatee to make a gift of his or her property, then what purpose does the conservatorship serve? Is it a flexible relationship in which the conservatee may choose when he or she desires the protection of the conservatorship? If so, could not the purpose of the conservatorship be undermined and the relationship rendered largely meaningless?

On the other hand, the facts of this particular case present an equally convincing argument for allowing a conservatee to gift property as he or she desires without the approval of the conservator or the court. The appointment of a conservator is not evidence of a person's competence or incompetence. Sec. 880.31(6), Stats. In this action to declare the deed void, the issue of Zobel's competency was litigated and the jury determined that she was competent at the time she made the gift. In executing the deed, Zobel had the assistance of an attorney who testified that he was satisfied that Zobel knew what she was doing when she executed the deed. There is a strong evidentiary record of Zobel's mental competency to gift her house. Her reluctance to inform her conservators was because she anticipated their

disapproval. If this court accepts the argument of the conservators, we would undo the clear intent of Zobel as found by the jury and supported by the evidence. We are reluctant to do so.

We also note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. It would appear anomolous for the law to accord some respect for the unsupervised legal actions of an incompetent under this statute, but give none to a conservatee who is presumed competent.

In conclusion, this court is uncertain a to the authority of a conservatee to dispose of his or her property. The statute provides little guidance and the case law is not particularly helpful. The supreme court should make the policy decision of whether the intent of the conservatee

ought to be the primary consideration, or whether the apparent Evans requirement that the conservator or the court approve of a gift ought to govern. We request, therefore, that the supreme court accept jurisdiction in this case.

STATE OF WISCONSIN CIRCUIT COURT
FOND DU LAC COUNTY

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her Guardians,

Plaintiffs,

vs.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants and Third-Party Plaintiffs,

vs.

HERBERT Z. HANCOX and HELEN W. HANCOX, individually,

Third-Party Defendants.

DECISION ON MOTIONS AFTER VERDICT of May 23, 1984

Case No. 82-CV-673

The above-entitled action was commenced in late September, 1982, when the initial summons and complaint were filed. Plaintiffs sought judgment declaring certain transactions entered into by Lillian Zobel on September 24,

1981 and March 8th (or 9th), 1982, to be null and void and for foreclosure of a land contract involving Zobel and the Fenendaels. Defendants answered denying all such allegations. Plaintiffs then filed an amended complaint in November of 1982 alleging Lillian Zobel was either incompetent or was unduly influenced at the time of the two transactions mentioned above. The case came on for trial before a jury on March 21, 1984, and lasted three days. With the exception of Lillian Zobel all parties were present throughout this trial. The jury by its verdict found that Lillian Zobel was competent at the times she entered the transactions of September 24, 1981 and March 9, 1982.

Plaintiff and defendants have filed motions after verdict. The plaintiffs motions are as follows:

1. To allow the plaintiffs to file the attached Amended Complaint pursuant to Sec. 802.09(1) and (2), Wis. Stats.

2. For a directed verdict in favor of the plaintiffs pursuant to Sec. 805.14(5)(d), Wis. Stats.

3. For judgment notwithstanding the erdict pursuant to Sec. 805.14(5)(b), Wis. Stats.

4. To change the answer to Question 2 to "No" pursuant to Sec. 805.14(5)(b), Wis. Stats.

5. In the absence of granting plaintiffs' Motions as aforementioned, plaintiffs hereby move pursuant to Se. 805.15, Wis. Stats., to set aside the verdict and for a new trial on the following grounds:

a. In the interest of justice.

b. Because of errors in the trial.

In addition to that stated above, the grounds for the above Motions are set forth in the Memorandum attached hereto and made a part hereof, and the Trial Memorandum filed by these plaintiffs. Defendants motions are as follows:

1. Judgment based on the special verdict dismissing the amended complaint.

2. Satisfying as paid in full all amounts due on the contract in question.

3. Declaring Gloria Fenendael to hold sole title to the real estate in question

4. Awarding defendants their taxable costs and disbursements. A hearing on these motions was held on May 7, 1984 and oral arguments presented. Both sides have filed briefs in connection therewith.

The background of this case shows that in December of 1979, Lillian Zobel sold her home to Lee and Gloria Fenendael

by means of a land contract. A little short of two years later (September 24, 1981) Zobel amended the land contract so as to affect its termination date. On December 18, 1981, Herbert Z. Hancox and Helen W. Hancox were appointed conservators of Lillian Zobel by the circuit court of Fond du Lac County. On March 9, 1982, Lillian Zobel signed a deed transferring full title to this real estate to Gloria Fenendael and cancelling any further indebtedness owing by Fenendaels. On July 20, 1982, the Hancoxs [sic] were appointed guardians of Lillian Zobel.

As stated in the first paragraph of this decision the initial complaint filed by plaintiffs alleged Zobel was not competent to enter into the transactions of September 24, 1981, and March 9, 1982. Their first amended complaint added a claim of undue influence to that

of incompetency. This undue influence allegation was later dropped by plaintiffs. Defendants have denied all such allegation in their responsive pleadings.

Plaintiffs' first motion after verdict seeks an amendment of the pleadings to permit them to charge the transfer or gift of March 9, 1982, by Zobel to Gloria Fenendael was "legally insufficient" because it was made during the time Zobel was under a conservatorship neither the conservators (plaintiffs herein) nor the court approved of such transaction. This raises a legal issue which was not found in any of plaintiffs pleadings when the trial commenced. Plaintiffs maintain that under the provisions of Sections 802.09(1) and (2), of the Wisconsin Statues, they are entitled to have their pleadings amended.

Defendants object to such motions and base their claim such motions should be denied on the provisions of Sections 802.06(2) and (4) of the Statutes. It is their position the plaintiffs by failing to plead this legal issue have waived their right to have it brought into the case at this stage of the proceedings by means of a motion after verdict.

Sections 802.09(1) and (2) of the Wisconsin Statutes read as follows:

(1) "Amendments. A party may amend the party's pleading one as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 20 days after service of the amended pleading unless (a) the court otherwise orders or (b) no responsive pleading is required or permitted under s. 802.01(1)"

(2) "Amendments To Conform To The Evidence. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The pertinent Sections of the Statute relied on by defendants are as follows:

Sections 802.06(2) and (4) state:

(2) "Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following

defenses may at the option of the pleader be made by motion.... (Emphasis supplied)."

(4) "The defenses specifically listed in sub. (2), whether made in a pleading or by motion, . . . shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred that the hearing and determination thereof be deferred until the trial. (Emphasis supplied). (See also section 802.06(8)."

The first mention by plaintiffs of the issue of the legality of the transfer of March 9, 1982, appeared in a "memorandum" filed by plaintiffs counsel with the court less than one week before the jury trial started. This document was dated March 16, 1984. It stated:

"1. The court should rule as a matter of law that the gift made by Lillian Zobel on March 8, 1982, was void inasmuch as it was not approved by either the conservator or the court."

At the close of the plaintiffs' case, their counsel asked for a ruling that the

transfer of March 9, 1982, (sometimes referred to as March 8, 1982, but they are one and the same transaction) be declared void as a matter of law based on the holding of Estate of Evans, 28 Wis. 2d 97. At the close of all the testimony and before the instructions and verdict conference, plaintiffs made motions to amend the pleadings to conform to the proof and for judgment for plaintiff because the conservators and the court had not approved the transaction of March 9, 1982. All such motions were resisted by defendants. Rulings were deferred until the jury verdicts came in.

It is uncontroverted the plaintiffs never raised their legal issue before trial in their pleadings or by motion. Their first such motions came at the close of their case in chief. Section 802.09(1) quoted above and relied on by plaintiffs states:

> (1) "Amendments. A party may amend the party's pleadings once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires."

Section 802.09(2) relating to conformity to the proofs places the granting of such amendments in the discretion of the court.

On the other hand we have the wording of Section 802.06(2) quoted supra, stating that with certain exceptions not pertinent in our case,

> "Every defense, in law or fact . . . shall be asserted in the responsive pleading. . . ."

Section 802.06(4) provides that such defenses,

> ". . . .shall be heard and determined before trial on motion of any party. . . ."

While it is true that the rules of pleading and practice are usually liberally construed, that does not mean that all regard for the rules laid down in the Statutes can be thrown to the winds. The liberality prescribed in Section 802.09 does not render meaningless the proscriptions found in Section 802.06. The legal issue as to the existence of the conservatorship and its effect as the transfer of March 9, 1982 was never formally raised until the close of the plaintiffs case at trial. Such an issue must have been considered by plaintiffs prior to trial - their trial memorandum reflects that. Plaintiffs could have brought this legal issue to the fore by bringing a motion prior to trial to insert it into their pleadings. As evidenced by the events at trial and subsequent there to this issue is of vital importance to plaintiffs

whole case. The verdict should it stand, makes this issue the very linchpin of plaintiffs case and seemingly their only hope of prevailing in the litigation. Defendants prepared for trial under the expectation they would have to refute the two contentions put forward in plaintiffs pleading: incompetency and/or undue influence. Defendants claim severe prejudice when this legal issue was thrust upon them during the course of trial. It is my opinion they were prejudiced. The facts of the conservatorship ad the date of the transfer of March 9, 1982, were well known to plaintiffs. If they intended to raise the legal issue of the legal effectiveness of this transaction in light of the surrounding circumstances, they should have done so in their pleadings and it should have taken place before trial so defendants could be

apprised of such an issue and given the opportunity to meet it with a defense of their own. As stated previously, amendments to pleadings should be liberally construed to permit amendments providing the amendment does not unfairly deprive the opposing party of timely opportunity to meet the issue created by the amendment. Tri-State Home Improvement Co., Inc., vs. Moraine Airways, Inc., 67 Wis 2d 109. It is my opinion plaintiffs' attempt to interject this legal issue into the case without having plead it in conformity with the Statutes was prejudicial to defendnats [sic] and prevented them from confronting such issue in a timely fashion.

Because of the foregoing, plaintiffs motion to amend their pleadings is denied.

Plaintiffs next motion is for judgment Notwithstanding the Verdict and

a Directed Verdict. This is based on the claim that under the holding of Estate of Evans, supra, plaintiffs are entitled to judgment as a matter of law in their favor. In effect plaintiffs claim that any action taken by the conservator without first securing approval of the conservator and the court having jurisdiction in the matter is a nullity and of no legal consequence. I do not interpret the Evans case in such a manner. As the author of the court's opinion in Evans states at the outset of the decision:

> "One question is presented on this appeal. It is whether the trial court erred in authorizing the conservator (a bank) to place the treasury notes owned by Evans (the conservatee) in joint tenancy with other."

The court held this was permissable [sic]. Admittedly there is language in the opinion which might be interpreted to hold that in our case Zobel could not

make the March 9, 1982 transfer without the approval of plaintiffs and the court. However, I consider this to be more in the nature of dictum and not the principal holding of this case. On March 9, 1982, neither the conservator nor the court challenged or objected to Zobel's transfer to Gloria Fenendael. On that date there was nothing to indicate Zobel was not competent and knew what she was doing. With the exception of Dr. Treffert's testimony based on his examination of Zobel about 2 1/2 months later, all other evidence indicated she was competent, knew what she was doing and intended to deed the property to Fenendael and cancel the balance owing on the land contract. In my opinion the ruling in the Evans case does not mandate a finding that the transaction by Zobel of March 9, 1982, is null and void and of no legal effect.

Plaintiffs also move for a new trial in the interest of justice and errors during the trial in the admission of hearsay testimony. It is axiomatic that a court has the power to order a new trial in the interest of justice. Stewart vs. Wolf, 85 Wis. 2d 461, Bartell v. Luedtke, 52 Wis. 2d 372. I do not agree that the verdict of this jury is not amply supported by the evidence. Lillian Zobel over the years exhibited a consistent course of conduct showing her regard and concern for the Fenendaels and especially Gloria Fenendael. There was a large amount of testimony as to Zobel's mental alertness, her ability to understand what she was doing and of expressing her wishes that things be done in just such fashion. The people having almost daily contact with her testified to her mental condition and stated that in their opinion she was manifestly

competent, alert, aware of what she was doing and verbalizing her desires in such respect. Her personal physician testified in the same vein - Lillian Zobel knew what she was doing and was perfectly competent at all relevant times in question. The only substantive testimony to the contrary was offered by Dr. Treffert. As stated earlier his opinion was based on an examination of Zobel some 2 1/2 months after March 9, 1982. The jury heard his testimony as well as that of all the other witnesses on this issue, and they considered it all in arriving at their verdict. It was for they jury to determine the weight, credibility and persuasiveness of such evidence. I do no consider their verdict to be against the great weight and preponderance of the evidence, testimony and exhibits. On the contrary it is my

opinion the verdict is amply supported by the evidence and should not be set aside.

As for errors during the trial in admissions of alleged hearsay testimony, plaintiffs feel to specify what such errors were and what they involved. Such a generalized vague objection cannot be used as a basis for upsetting the jury's verdict.

Based on the foregoing the plaintiffs' motions after verdict are denied. Judgment on the jury's verdict is to be entered. Record title to the real estate in question is to decreed to be in Gloria Fenendael. Payments due and owing on the land contract, up to

March 9, 1982, if any are to be paid to the guardians of Lillian Zobel.

DATED: May 23, 1984

BY THE COURT:

/s/ John P. McGalloway, Jr.
John P. McGalloway, Jr.
Circuit Judge

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 8, 1986

To: Hon. John P. McGalloway, Jr.
Fond du Lac County Courthouse
Fond du Lac, WI 54935

David Colwin
Colwin, Fortune, Colwin,
Pomeroy & English, S.C.
P.O. Box 1476
Fond du Lac, WI 54935

Kenan J. Kersten
Kersten & McKinnon
231 W. Wisconsin Ave.,
Suite 1102
Milwaukee, WI 53203

The Court today announced an order in your case as follows:

No. 84-1539 Zobel v. Fenendael

The court having considered defendants-respondents-petitioners Lee and Gloria Fenendael's petition for review of an adverse decision of the court of appeals, district II, dated November 20, 1985,

IT IS ORDERED the petition for review is denied, with $50 costs to plaintiff-appellant Lillian Zobel.

Marilyn Graves
Clerk of Supreme Court

STATE OF WISCONSIN
SUPREME COURT
and
COURT OF APPEALS
DISTRICT II

LILLIAN ZOBEL, by
Herbert Z. Hancox and
Helen W. Hancox, her
guardians,

Plaintiff-Appellee,

v.

Appeal No. 84-1539
Filed July 3, 1986

LEE FENENDAEL and
GLORIA FENENDAEL, his
wife,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Lee Fenendael and Gloria Fenendael, the appellants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the whole of the final order of the Wisconsin Court of Appeals, District II, rendered November 20, 1985, reversing a judgment of the Fond du Lac

County Circuit Court in case number 82-CV-673, which was entered June 21, 1984. The above-captioned appellants petitioned the Wisconsin Supreme Court for review of the November 20, 1985 decision of the Wisconsin Court of Appeals, District II, and the Wisconsin Supreme Court denied review in its order of April 8, 1986.

The United States Supreme Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257(2).

Dated at Milwaukee, Wisconsin, this 2nd day of July, 1986.

Respectfully submitted,

E. Campion Kersten
Kenan J. Kersten
Ann L. Muchin
Attorneys for the Appellants

_____
E. Campion Kersten

P.O. ADDRESS:

Kersten & McKinnon
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 271-0054

Portion of petition to Wisconsin Supreme Court to review. Referring to constitutional rights.

II. HOLDING THAT A CONSERVATEE IS LEGALLY PRECLUDED FROM GIFTING HER PROPERTY DEPRIVES A CONSERVATEE OF DUE PROCESS OF LAW FOR GIFTS MADE PRIOR TO THE EFFECTIVE DATE OF THAT HOLDING.

At the time of the gift (until the date of the court of appeals opinion) there was no existing Wisconsin law restricting the powers of a conservatee to dispose of property. (See Certification at 6). Without authority to the contrary, it is unconstitutional to deprive Lillian Zobel, as a matter of law, of the right to dispose of her own property in March of 1982 by an appellate decision rendered November 20, 1985. Denying review would result in a new pronouncement of law voiding an action which was valid at the time it occurred. Although the conservatorship statutes provide a mechanism whereby a transaction is voidable (dependent upon

the factual circumstance of competency), adherence to the court of appeals decision voids the transaction as a matter of law.

The only existing law pertaining to a conservatee's powers deals with factual competency, not legal competency. Section 880.31(6) expressly provides that a conservatorship "shall not be evidence of the competency or incompetency of the [conservatee]." Section 880.215 provides that a ward subject to a limited guardianship has the power to enter a valid contract and it will not be held void "unless the determination is made by the court in its finding under s. 880.33(3) that the ward is incapable of exercising the power to make contracts." It is clearly unconstitutional to permit an incompetent ward to convey and hold property in certain situations, yet preclude a

conservatee who has not had the benefit of a hearing regarding competency from gifting her own property.

This is particularly ironic in the case at bar where this legal issue was never raised until the close of the plaintiffs' case in chief and there was a three day trial where the mental incompetency was the sole issue at trial. A jury found that the conservatee was mentally competent and intended to gift her property to the Fenendaels and the trial judge entered judgment on that verdict. Considering the foregoing, the supreme court should not condone precedent which precludes, as a matter of law, a conservatee from conveying property when it has already been litigated and decided that she was mentally competent when she did so. As the court of appeals notes, it is not even remanding the matter to the trial

court for further findings or an additional evidentiary hearing where testimony from the conservatorship court can be presented. Opinion, n.13 at 21. It merely voids the transaction, reversing the judgment entered on the jury's verdict.

The court of appeals voids this finding of mental competency and creates a legal preclusion which did not exist at the time of the transaction. As the Wisconsin Supreme Court has recognized:

> There is a high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or by will, - holds. It is not the business of courts to undo what an old person may have done with h[er] property because of judicial notions of propriety or moral obligations, in a case of this sort, where the wishes of relatives, however deserving. Did the [wo]man do freely what [s]he wanted to and was competent to decide upon? Those are the sole questions.

In re Estate of Bauer, 264 Wis. 556, 561, 59 N.W.2d 481 (1956)(quoting Boardman v. Lorentzen, 155 Wis. 566, 579, 145 N.W. 750 (1915)(emphasis supplied)). The court of appeals decision, creates law which is incongruous with the existing statutory law pertaining to conservatorships and guardianships and voids the clearly intended and competent act that Lillian Zobel took in March of 1982. This unwarranted deprivation of Lillian Zobel's constitutional rights, on an ex post facto basis, in and of itself warrants this court's review pursuant to Rule 809.62(1)(a).

III. WISCONSIN STATUTES SECTION 809.62(1)(d) APPLIES.

Although the issue of law determined by the supreme court in Estate of Evans related to the authority of a conservator, the court did state that "a conservatee is not considered completely

incapable of looking after his own property" (28 Wis. 2d at 100) and that it should not be necessary for a competent conservatee to terminate the conservatorship in order to consummate competently intended transactions. 28 Wis. 2d at 101. To the extent the court in Evans intended to keep the concept of conservatorship sufficiently flexible to permit the conservatee to act outside the conservatorship under certain circumstances, the court of appeals decision in this case conflicts with Evans. Since there is no controlling supreme court decision or Wisconsin statute requiring the court of appeals holding herein, the supreme court should review and decide this case to resolve that apparent conflict. If, as the court indicated in Evans, the concept of conservatorship is to be sufficiently flexible to recognize as valid acts of

conservatees in certain cases, this, under the undisputed record, is such a case. Rather than repeating the extensive evidentiary record reviewed in the statement of facts herein upon which Lillian Zobel was found at trial to have been competent at the time in question, it should suffice to cite the court of appeals' statement that "there is a strong evidentiary record of Zobel's mental competency to gift her house" (Certification at 5) and that "invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to have been competent at the time of the gift" (Opinion at 16)(emphasis supplied).

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state capitols wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis supplied).

Wisconsin Constitution, Article I

Declaration of Rights

> Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights,

governments are instituted, deriving their just powers from the consent of the governed.

Wis. Const. art. I, § 1.

Wisconsin's Conservatorship Statute

880.31 Voluntary Proceedings; Conservators

(1) Any adult resident who believes that he or she is unable properly to manage his or her property or income may voluntarily apply to the circuit court of the county of his or her residence for appointment of a conservator of the estate. Upon receipt of the application the court shall fix a time and place for hearing the application and direct to whom and in what manner notice of the hearing shall be given.

(2) At the time of such hearing the applicant shall be personally examined and if the court is satisfied that the applicant desires a conservator and that the fiduciary nominated is suitable, the court may appoint him as such and issue letters of conservatorship to him

upon the filing of a bond in the amount fixed by the court.

(3) A conservator shall have all the powers and duties of a guardian of the property of an incompetent person. The conservator's powers shall cease upon being removed by the court or upon death of the person whose estate is being conserved.

(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent, remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(5) If the court shall upon such hearing

determine that he person whose estate is administered by a conservator may be incapable of handling his estate, the court shall order the conservatorship continued, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(6) Appointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered.

(7) If an application for conservatorship is filed, the fee prescribed in s. 814.66(1)(b) shall be paid at the time of the filing of the inventory or other documents setting forth the value of the estate.

Wis. Stats. § 880.31 (emphasis supplied).

Supreme Court, U.S.
FILED
AUG 15 1986
JOSEPH F. SPANIOL, JR.

(3)

No. 86-150
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

v.

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

On appeal from the Wisconsin Court of Appeals, District II, following a denial of review of the Wisconsin Supreme Court

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MOTION TO AFFIRM AND APPENDIX

David Colwin

COLWIN, FORTUNE, COLWIN,
POMEROY & ENGLISH, S.C.
201 South Marr Street
P.O. Box 1476
Fond du Lac, WI 54935
(414) 921-5770

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MOTION TO AFFIRM, OR IN THE ALTERNATIVE, MOTION TO DISMISS

The plaintiff-appellee hereby moves the United States Supreme Court for an order affirming the Order of the Wisconsin Supreme Court denying the defendants-appellants' Petition for Review, or in the alternative, for an order dismissing the appeal of the defendants-appellants pursuant to United States Supreme Court Rule 16, 28 U.S.C., on the grounds that:

1. The United States Supreme Court does not have jurisdiction pursuant to 28 U.S.C. 1257(2) or (3) inasmuch as the defendants-appellants have failed to explicitly and timely raise the constitutional issue set forth in the Jurisdictional Statement.

2. The Wisconsin Court of Appeals' Decision rests upon an adequate non-federal basis.

3. The defendants-appellants do not have standing to raise the constitutional issue set forth in the Jurisdictional Statement.

STATEMENT OF FACTS

On December 20, 1979, Lillian Zobel sold her house on a land contract to the Fenendaels. In November, 1981, Miss Zobel petitioned the Circuit Court for the appointment of a conservator of her estate. The conservatorship court appointed the Hancoxes as conservators of Miss Zobel's estate. After the appointment of the Hancoxes, Miss Zobel allegedly decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March, 1982, Miss Zobel executed a deed to Gloria Fenendael in satisfaction of the balance of the land contract. She did not inform the Hancoxes or the

conservatorship court of the transaction nor seek their approval of the gift (42/35, 340).

Shortly thereafter, Dr. Darold A. Treffert, a Fond du Lac psychiatrist, was appointed by the court to conduct a psychiatric evaluation for the purpose of determining whether Lillian Zobel was competent to enter into the real estate transaction on March 9, 1982 (42/44). Dr. Treffert conducted the evaluation on May 25, 1982, and concluded that Miss Zobel was not competent to understand the transaction (42/53, 49).

After receiving Dr. Treffert's report, Mr. and Mrs. Hancox petitioned the court for a guardianship for Miss Zobel, and on July 20, 1982, they were appointed guardians. At no time was the gift of the balance of the land contract approved by either the conservators or the conservatorship court (42/340).

This action was brought for the purpose of having the gift declared void. The case was tried before a jury in March, 1984, and the jury returned a verdict finding that Lillian Zobel was competent at the time she executed the deed in March, 1982.

During the course of the trial, the trial court judicially noticed the conservatorship and guardianship files regarding Zobel (42/382). The record reveals that the conservatorship was referred to by the Hancoxes or the Fenendaels on 17 occasions before the Fenendaels objected on the relevancy and pleading grounds asserted on this appeal (App. 1:9).

At the close of the plaintiffs' case and at the close of the evidence, the Hancoxes requested that they be allowed to amend their pleadings for judgment as a matter of law on the ground that the

deed was void inasmuch as it was not approved by the conservators or the conservatorship court (42/383-384, 388, 391, 467-468). The court rendered a written decision on Motions After Verdict on May 23, 1984, in which it denied the Hancoxes' motions to amend the Complaint and for judgment notwithstanding the verdict.

The plaintiff-appellee appealed the trial court's Judgment to the Wisconsin Court of Appeals. The Court of Appeals rendered a decision on November 20, 1985, reversing the trial court's Decision and directing judgment in favor of the plaintiff holding that a conservatee:

> "...requires the approval of either the conservator or the conservatorship court in order to make an effective gift of her property." (App. 1:17)

The defendants-appellants thereafter petitioned the Wisconsin Supreme Court

for review of the Decision of the Court of Appeals. The Supreme Court denied the Petition on April 8, 1986 (App. 3:1).

ARGUMENT

A. THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. 1257 (2) or (3) INASMUCH AS DEFENDANTS-APPELLANTS HAVE FAILED TO EXPLICITLY AND TIMELY RAISE THE CONSTITUTIONAL ISSUE SET FORTH IN THE JURISDICTIONAL STATEMENT.

The defendants-appellants claim the Wisconsin Court of Appeals' interpretation of §880.31, Wis. Stats., is repugnant to Section One of the Fourteenth Amendment to the federal Constitution, and Article One, Section One of the Wisconsin Constitution. Defendants-appellants assert jurisdiction pursuant to 28 U.S.C. 1257(2) and (3) and 28 U.S.C. 2106.

It has long been settled that in order for the United States Supreme Court to have jurisdiction on appeal or on petition for certiorari, the appellant must have explicitly and timely challenged the constitutionality of a state statute. In Raley v. State of Ohio, (1959) 360 U.S. 423, 79 S.Ct.1257, 3 L.Ed.2d 1344, the Supreme Court stated the following:

> "It is essential to our jurisdiction on appeal that there be an explicit and timely insistence in the state courts that a state's statute, as applied, is repugnant to the federal Constitution, treaties or laws."

Similarly, it is also true that when a state court fails to rule on a federal question, it is assumed that the appellant did not properly present the issue in the state court. In Fuller v. State of Oregon, (1974) 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642, the court stated:

> "[T]his court has stated that when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

In this case, the defendants-appellants did not raise any constitutional issue in the trial court or Court of Appeals and, therefore, neither the trial court nor the Court of Appeals passed on any federal question. The first suggestion of any constitutional issue was in the defendants-appellant's Petition for Review to the Wisconsin Supreme Court. The Supreme Court refused to accept the case for review and, therefore, no Wisconsin court has addressed the constitutional issue raised by defendants-appellants.

Even assuming defendants-appellants have timely raised the constitutional

issue, they have not complied with the requirement that the issue be raised explicitly in the state court. Recently, in Webb v. Webb, (1981) 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392, the Supreme Court reiterated the explicitness requirement holding that the court will not accept jurisdiction unless an appellant has raised the constitutional issue in the state courts in such a way as to give the state courts the opportunity to adequately address the issue. The court stated the following at 101 S.Ct. 1889, 1892:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

The Supreme Court refused to assume jurisdiction in Webb where, although the appellant did use the phrase "full faith

and credit" at several points in the state court proceeding, she did not cite the federal Constitition or any cases relying on the full faith and credit clause of the federal Constitition.

In this case, the only references to a constitutional issue in the defendants-appellants' Petition for Review to the Wisconsin Supreme Court are:

1. A reference to "due process" in the defendant-appellants' Petition for Review at the heading of one of the arguments (App. 4:1), and

2. Two references to the term "unconstitutional."

There is no reference to the United States Constitution. There is no reference to the Wisconsin Constitution. There is no reference to any case law which would apprise the Wisconsin Supreme

Court of the specific constitutional argument relied upon by defendants-appellants.

In short, defendants-appellants have failed to timely and explicitly raise any federal constitutional issue and the United States Supreme Court should, therefore, deny jurisdiction.

B. THE WISCONSIN COURT OF APPEALS' DECISION RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

Not only have the defendants-appellants failed to explicitly and timely raise a federal constitutional issue, the Wisconsin Court of Appeals' Decision rests upon a well-reasoned non-federal basis. Inasmuch as the Court of Appeals' Decision does not rest upon a federal ground, the United States Supreme Court does not have jurisdiction. Cramp v. Board of Public

Instruction of Orange County, Florida, (1961) 368 U.S. 278, 82 S.Ct. 275, 7 L.ed 2d 285.

Although the appointment of a conservator pursuant to §880.31, Wis. Stats., shall not be evidence of the incompetency of the person whose estate is being administered, the clear purpose of the statute is to provide court protection to those who are unable to properly manage their property or income without the stigma of incompetency. Estate of Evans, (1965) 28 Wis.2d 97, 100, 135 N.W.2d 832. It certainly makes no sense to have a conservatorship unless the court having jurisdiction over the conservatorship affords the conservatee some degree of protection. At the very least, that protection contemplates the conservatee and conservator conferring prior to making a gift so that the conservatee has a

thorough understanding of his or her financial condition and the effect the gift could have on the estate.

In most instances, once a conservatorship has been established, the conservator will have a much better understanding of the condition of the conservatee's estate than the conservatee and, therefore, will be in a better position to determine whether the conservatee can afford to make the contemplated gift.

The purpose of having court approval of a gift is to ensure that the conservatee is being protected by being properly advised and informed by the conservator prior to the gift being made. Unlike a legacy, a gift can have serious consequences on the conservatee at the time the gift is made. If the conservatee is to be protected by the court, it is essential that the court

having jurisdiction over the conservatorship be assured that the conservatee has been properly advised by the conservator of the consequences of the gift, and that the conservatee is in a position to make the gift.

Without the necessity of court approval of gifts, conservatees would be free to make gifts without the knowledge of the conservator or the court, regardless of whether the conservatee has a thorough understanding of his or her financial condition and the effect the gift would have on the estate.

Contrary to the statements made in defendants-appellant's Jurisdictional Statement, those who witnessed the March 9, 1982, transaction did not discuss thoroughly with Lillian Zobel the effect the gift would have on her estate and her future. The Hancoxes' primary concern was that Lillian Zobel be

allowed to remain in the hospital, as opposed to a nursing home, as long as she so wished, and they were concerned that the making of a substantial gift could well have an effect on her ability to remain in the hospital (42/14, 24, 370). It may well be that Lillian Zobel understood that she was giving away property with a value in the area of $50,000; however, that is not to say that Lillian Zobel understood how the transaction would affect her life in the immediate future. There was no evidence that the transaction was made with a thorough understanding of the extent of her estate and with an understanding of how the transaction was going to affect her. The evidence was undisputed that those who were in the best position to advise her as to the possible consequences of the gift, i.e., the

conservators, were not consulted prior to the transaction.

While the facts in the Evans case differ from those in this case, the Evans' decision suggests that a conservatee must have approval of the conservator and/or the court prior to making a gift. After discussing the purpose of the conservatorship statute, the court indicated that inasmuch as the conservatee is not completely incapable of looking after his own property:

> "...it makes no sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection." Evans, 135 N.W.2d, at 834 (Emphasis Added).

The court also stated that the conservatorship statute:

> "...does not prevent the conservator with its and the court's approval from making a transfer such as the creation of the joint tenancies sought by the conservatee, Evans, in the instant case." Evans, 135 N.W.2d, at 834 (Emphasis Added).

As the Court of Appeals indicated in its Decision (App. 1:21, 22), the protection afforded by the court in a conservatorship would be nullified without the necessity of prior court approval of gifts:

> "If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose...
>
> For us to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless."

C. THE DEFENDANTS-APPELLANTS DO NOT HAVE STANDING TO RAISE THE CONSTITUTIONAL ISSUE ASSERTED IN THE JURISDICTIONAL STATEMENT.

One of the requirements of standing is that the appellant must assert his

own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Robert Warth v. Ira Seldin, (1975) 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343.

In this case, the defendants-appellants challenged the Wisconsin Court of Appeals' interpretation of the Wisconsin conservatorship statute, §880.31, Wis.Stats. The statute and the Wisconsin Court of Appeal's Decision address only the rights of a conservatee. Neither the statute nor the Decision address the rights of a donee. Although the defendants-appellants have couched the constitutional issue in the Jurisdictional Statement in language suggesting an infringement of the rights of a conservatee and a donee, in the final analysis the defendants-appellants are challenging the requirement that a

conservatee obtain conservator or court approval of a gift. The defendants-appellants claim such a restriction is an unconstitutional infringement on a conservatee's right to dispose of property (See Jurisdictional Statement P. 11). Thus, the defendants-appellants rest their claim for relief on the legal rights of the conservatee and, therefore, do not have the requisite standing to raise the constitutional issue set forth in the Jurisdictional Statement.

CONCLUSION

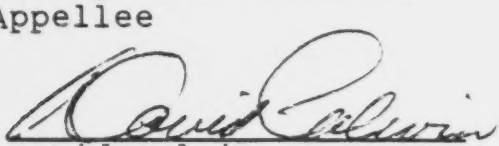
For the above reasons, the plaintiff-appellee respectfully submits that the United States Supreme Court affirm the decisions of the Wisconsin Court of Appeals and Wisconsin Supreme

Court, or in the alternative, dismiss the appeal and Petition for Certiorari.

Dated this 13th day of August, 1986.

Respectfully sumbitted,

COLWIN, FORTUNE, COLWIN,
POMEROY & ENGLISH, S.C.
Attorneys for Plaintiff-
Appellee

By 
David Colwin

201 South Marr Street
P. O. Box 1476
Fond du Lac, WI 54935
(414) 921-5770

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STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

DECISION of November 20, 1985 No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Fond du Lac county: JOHN P. McGALLOWAY, JR., Judge.

Reversed and cause remanded.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

NETTESHEIM, J. Herbert and Helen Hancox, guardians of Lillian Zobel, appeal from a judgment entered following a jury trial dismissing their complaint which sought to void a gift by deed executed by Zobel to Lee and Gloria Fenendael. The jury determined that

Zobel was competent at the time she made the gift.

During trial, the Hancoxes sought to amend their complaint to conform to certain evidence which showed that Zobel executed the deed while she was subject to a conservatorship. The Hancoxes claimed that Zobel's gift was void, as a matter of law, since it was made without the approval of the conservator or conservatorship court. The trial court denied the motion to amend the pleadings. We conclude the denial of the motion was an abuse of discretion since no surprise or prejudice to the Fenendaels is demonstrated. We also conclude, as a matter of law, that a conservatee lacks the capacity to make a gift without the approval of the conservator or the conservatorship court. Therefore, we reverse and remand with instructions to allow amendment to

the pleadings and to enter judgment in favor of the Hancoxes.

On December 20, 1979, Lillian Zobel sold her house on a land contract to the Fenendaels. In November, 1981, Zobel petitioned the circuit court for the appointment of a conservator of her estate. The conservatorship court appointed the Hancoxes as conservators of Zobel's estate. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March, 1982, Zobel executed a deed to the Fenendaels in satisfaction of the balance of the land contract. She did not inform the Hancoxes or the conservatorship court of the pending transaction nor seek their approval of the gift. [1]

The amended complaint upon which the jury trial was conducted alleged that

Zobel was not competent to make the gift by deed in March 1982. [2] Based upon these allegations, the Hancoxes sought foreclosure of the land contract. During the course of the Hancoxes' case-in-chief, testimony and documentary evidence established that Zobel was subject to the conservatorship at the time she executed the March 1982 deed in satisfaction of the land contract.

At the close of the Hancoxes' case, the trial court judicially noticed the conservatorship and guardianship file regarding Zobel. The Hancoxes moved for leave to amend their pleadings to include "the defense that the gift was not approved either by the conservator or the court." [3] Based upon this amendment, the Hancoxes then requested judgment as a matter of law contending that Zobel, as a conservatee, lacked the capacity to make a gift. The trial court took the motions

under advisement and stated that it would proceed to take a verdict.

At the close of the evidence, the Hancoxes again moved to amend their amended complaint to conform to the evidence and for judgment. The trial court again deferred ruling on the motions until a verdict was obtained. By decision on motions after verdict, the trial court denied the motion to amend the pleadings. The trial court's decision also, however, determined that the approval of the conservator or the conservatorship court was not required to render Zobel's gift effective. [4]

The Fenendaels rely upon sec. 802.06(2) and (4), Stats., which provides, in part:

> (2) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the

> responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion ....
>
> (4) The defenses specifically listed in sub. (2), whether made in a pleading or by motion, . . . shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred until the trial. [Emphasis added.]

This statute, however, does not apply to complaints. It is limited, on its face, to defenses asserted in a responsive pleading. Therefore, the Fenendaels' reliance on this statute and the related line of cases they cite is misplaced. [5]

Rather, the governing statute is sec. 802.09(2), Stats. The most complete discussion and analysis of this statute is contained in State v. Peterson, 104 Wis. 2d 616, 312 N.W.2d 784 (1981). Peterson bifurcates the statute into two parts governing two different fact

situations. The first addresses a situation where the issues are tried by the express or implied consent of the parties:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues ....

Sec. 802.09(2). This part of the statute appears to be mandatory; if the trial court concludes that the parties consented to the trial of the issues, the court must conform the pleadings to the proof. Peterson at 629, 312 N.W.2d at 790.

The second addresses a situation where an objection is made at trial that

the evidence offered is not within the issues raised by the pleadings. Id.

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objection party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Sec. 802.09(2), Stats. When objection is made, the statute grants the court discretion to allow the amendment and encourages the court "to do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining the ... defense upon the merits." Peterson

at 629-30, 312 N.W.2d at 790-91.

Our reading of the entire record in this case reveals that the existence of the conservatorship was alluded to scores of times without objection. Documentary evidence establishing the existence of the conservatorship was stipulated into evidence. At various stages in the proceedings, the Fenendaels themselves put in evidence concerning the conservatorship. The record reveals, by our court, seventeen references to the conservatorship by either the Hancoxes or the Fenendaels before the Fenendaels objected on the relevancy and pleading grounds asserted on this appeal. Under these circumstances, we conclude that the Fenendaels did not timely object to the proofs submitted. Therefore, we analyze the issue on the motion to amend the pleadings as one governed by the first portion of sec. 802.09(2), Stats. This

requires us to determine whether the issues relating to the conservatorship were tried by the express or implied consent of the parties.

Here, there was no express consent.[6] Thus, if the Fenendaels consented to trial of the conservatorship issues, the consent must be implied.

Whether an issue has been tried by implied consent is to be determined by the circuit court; the circuit court must make findings on the issue of consent, because once consent is found, the circuit court has no choice but to amend the pleadings. Peterson at 631, 312 N.W.2d at 791. Here, the circuit court did not make any findings that there was -- or was not -- implied consent. We are thus faced with the issue of whether we can on the basis of the record before us determine whether, as a matter of law, the Fenendaels understood, were aware of,

or had actual notice that the issue of Zobel's legal capacity as a conservatee was being raised by the evidence concerning the conservatorship. See id.

Implied consent is generally held to exist where there is no objection to the introduction of evidence on the unpleaded issue and where the party not objecting is aware that the evidence goes to the unpleaded issue; actual notice to the parties appears to be the key factor in determining whether there was implied consent. Id. at 630, 312 N.W.2d at 791. As noted above, the evidence concerning the conservatorship was admitted without timely objection. The more difficult question is whether the Fenendaels were aware that the conservatorship evidence went to the issue of Zobel's capacity to make a gift -- an unpleaded issue. In order to find implied consent, it must appear that the

parties understood the evidence was aimed at the unpleaded issue. Id. Because the evidence on the conservatorship issues was also relevant to the issue of Zobel's competency, the Fenendaels may not have been aware that the Hancoxes were raising a new unpleaded issue. Thus, we cannot conclude, as a matter of law, that the Fenendaels had actual notice that the evidence concerning the conservatorship went to the unpleaded issue. Therefore, the Fenendaels did not impliedly consent to the trial of such issue.

Our analysis does not stop at this point, however. This is because Peterson engrafts upon sec. 802.09(2), Stats., an "interests of justice" determination even after a finding that no implied consent to the trial of the unpleaded issue existed.

> If the evidence has been introduced without objection and the circuit court finds

> that there has been no actual notice, it should find that there has been no implied consent of the unpleaded issue. Under such circumstances, the circuit court may sua sponte under sec. 802.09(1), (2) amend the pleadings to conform to the evidence if the circuit court concludes that justice so requires. Amendment is thus within the discretion of the circuit court and the circuit court in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment.

Id. at 634, 312 N.W.2d at 793 (emphasis added). This "interests of justice" consideration is, essentially, a determination of prejudice. See id. at 635, 312 N.W.2d at 793. [7]

Although the supreme court in Peterson did not expressly state that the determination of prejudice in this context presents a question of law, we conclude that it does. We do so not only because the supreme court in Peterson

proceeded to address the question, but also because prejudice, in other contexts, has been held to present a mixed question of law and fact. State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

Here, the historical facts relating to the question of prejudice are undisputed. Thus, we are left with only the legal question as to whether prejudice exists. This court is not bound by a trial court finding based on undisputed evidentiary facts when the finding is essentially a conclusion of law. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985).

The trial court concluded that permitting the amendment to the complaint would prejudice the Fenendaels. However, the trial court did not specify in what respects such prejudice existed. [8] Upon

appeal, the Fenendaels opine that the granting of the motion would have prompted a need to present evidence establishing the "selfish motivation of the Hancoxes and Lillian Zobel's personal motives in going ahead with the transaction before telling the Hancoxes." But such testimony would have no bearing on the legal question of the capacity of a conservatee to make a gift without conservator or conservatorship court approval. The same holds true for the Fenendaels' claim that "the testimony of the judge in the conservatorship proceedings might have been presented." [9]

The amendment to the pleadings would simply have placed before the trial court the underlying legal question presented on this appeal as to whether a conservatee may make a gift of her property without approval of the conservator or her conservatorship

court. No prejudice is shown (and we can fathom none) by the granting of the amendment. The existence of the conservatorship was acknowledged by all parties. Its presence raised a legitimate legal question which the trial court addressed in its ruling on the motion for judgment notwithstanding the verdict. When the facts pertaining to the conservatorship were repeatedly addressed at trial without timely objection, we are at a loss to perceive any prejudice by granting a motion to amend the pleadings to conform to such evidence. [10]

Statutes governing amendment of pleadings are to be liberally construed to permit the presentation of the entire controversy providing such amendment does not unfairly deprive the opposing party of an opportunity to meet the new issue. Gustavson v. O'Brien, 87 Wis. 2d

193, 204, 274 N.W.2d 627, 633 (1979); Wipfli v. Martin, 34 Wis. 2d 169, 174, 148 N.W.2d 674, 677 (1967). Here, we do not see the requested amendment to the pleadings as unfairly depriving the Fenendaels of the opportunity to meet the relevant factual and legal issues presented by Zobel's status as a conservatee. Indeed, the trial court decision points to no such specific prejudice. Under these circumstances, the interests of justice required the granting of the amendment to the pleadings, despite the lack of actual notice to the Fenendaels. Peterson at 634, 312 N.W.2d at 793.

We now turn to the legal issue presented by the amendment to the complaint: Whether a conservatee requires the approval of either the conservator or the conservatorship court in order to make an effective gift of her

property. [11] We conclude she does.

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118. The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the

property of an incompetent person. Sec. 880.31(3). Section 880.31, however, does not address the power or capacity of a conservatee to dispose of his or her property.

Evans determined that a conservator had the authority to create a joint tenancy in certain of the conservatorship property when the transfer was sought by the conservatee and when approved by the conservatorship court. The Hancoxes argue that certain supreme court language in Evans always requires approval of the conservator or the conservatorship court before a conservatee can effectively act. "[I]n a conservatorship, where there is no adjudication that the applicant is incompetent, It makes sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection." Evans at 101, 135

N.W.2d at 834 (emphasis added). However, the facts in Evans are quite different from those here. In Evans, the conservator was directed to transfer the conservatee's property pursuant to the conservatee's petition and the conservatorship court's order. Here, the conservatee did not seek the prior approval of either the conservator or the conservatorship court. In fact, she expressly sought to circumvent both. In our certification to the Wisconsin Supreme Court we asked whether the intent of the Evans language was to require conservator or conservatorship court approval in all instances.

Although the appointment of a conservator is not evidence of the incompetency of the conservatee, and although a conservatee is not considered completely incapable of looking after his or her own property (Evans at 100), the

purpose of a conservatorship is to afford the protections akin to those provided by a guardianship but without the stigma of incompetency. See Evans at 100, 135 N.W.2d at 834. If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose.

If a conservatee wishes to rid himself or herself of the restrictions of a conservatorship, the statute supplies an avenue for relief.

> 880.31(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent,

> remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

We acknowledge that invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to be competent at the time of the gift. However, for us to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless. Such interpretations are to be avoided. See Johnson v. State, 76 Wis. 2d 672, 676, 251 N.W.2d 834, 836 (1977). [12]

We therefore reverse and remand this matter to the trial court with directions to grant the Hancoxes' motion to amend the complaint to conform to the evidence and to enter judgment upon the second amended complaint in favor of the

Hancoxes.

By the Court. -- Judgment reversed and cause remanded. [13]

Recommended for publication in the official reports.

APPENDIX

[1] It was only after these events that the Hancoxes were appointed Zobel's guardians.

[2] The amended complaint also challenged Zobel's competency to make a September 1981 amendment to the original land contract. This amendment predated the conservatorship. The jury found Zobel to be competent at the time she signed this amendment. This finding is not challenged upon this appeal.

The amended complaint also raised a claim of undue influence. This, however, was withdrawn at the close of the Hancoxes' case.

The parties agree that the jury issue of Zobel's competency goes to the question of her mental state and does not address the question of her "capacity" to make a gift while subject to a conservatorship.

[3] Technically, this was not a motion to amend to conform to the evidence under sec. 802.09(2), Stats., since the Hancoxes based their motion upon sec. 802.09(1) and (4). However, no prejudice is demonstrated by this failure to refer to the correct subsection since the Hancoxes' attorney indicated that his motion was to amend the pleadings to include the evidentiary references to the conservatorship. In addition, the reference to a "defense" was technically inaccurate since the Hancoxes' pleading was a complaint.

[4] This ruling was made in response to the Hancoxes' motion for judgment

notwithstanding the verdict. Thus, the trial court, despite denying the motion to amend the pleadings, nevertheless reached the legal issue of whether a conservatee could make an effective gift under these circumstances. However, upon appeal, neither party argues that the trial court's judgment notwithstanding the verdict ruling moots the issue concerning the amendment of the pleadings. Nor does either party address the interaction between the two procedural statutes. We choose therefore to address this case on the issue raised and briefed by the parties -- the propriety of the trial court's denial of the motion to amend the pleadings.

[5] Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979); Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984); Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975); Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964); Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d 651 (1975).

[6] Express consent may be given by stipulation, or may be incorporated in a pretrial order and rarely raises any serious fact question. State v. Peterson, 104 Wis. 2d 616, 630 n. 17, 312 N.W.2d 784, 791 (1981). See also 6 C. Wright and A. Miller, Federal Practice and Procedure - Civil § 1493, at 461-62 (1971).

[7] Peterson applied the prejudice determination in a situation where the court had acted sua sponte to amend the

complaint to conform to the evidence. Id. at 634, 312 N.W.2d at 793. We see no reason to fashion a different rule in a case such as this where as party has moved to amend a complaint to conform to the evidence. Were we to limit Peterson to only those cases where the court has acted sua sponte, a party who does not move to amend a complaint would receive the benefit of a prejudice determination, whereas a party who place the issue before the court would be denied this determination. This would result in an uneven and unreasonable application of the statute. Such an application is to be avoided. See State Central Credit Union v. Bigus, 101 Wis. 2d 237, 242, 304 N.W.2d 148, 150-51 (Ct. App. 1981). Moreover, when the supreme court fashioned the balancing test in Peterson, it was interpreting sec. 802.09(2), Stats., which contemplates a motion made by a party -- not the court.

[8] The trial court's finding of "prejudice" to the Fenendaels is actually more akin to a finding of laches against the Hancoxes. While a consideration of laches is certainly appropriate in this "balancing of interest proceeding," laches does not necessarily equate with prejudice.

[9] This gratuitously assumes that such testimony is admissible.

[10] The cases relied upon by the Fenendaels are inapposite. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), and its language relating to certain "tactics" on the part of the city attorney smack more of estoppel than prejudice. Moreover, the language is

dicta to the rule of the case which holds that the notice of claim given by the plaintiff was sufficient. It was upon this latter issue that he supreme court reversed the court of appeals -- not any finding or conclusion relating to the conduct of the city attorney.

Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975), also does not apply since the issue raised by the defendant upon appeal was not raised in his responsive pleadings.

Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964), was a summary judgment case in which the trial court rejected a proposed amended answer. Thus, Poehling is only a pleading case and decided only on the pleadings in which the defendant claimed a right to try its defenses seriatim; first by demurrer, then by a plea in abatement, and finally by an answer on the merits. Poehling is not an amendment of pleadings to conform to the evidence case.

The same is true for Trispel v. Haefer, 89 Wis. 2d 725, 279 N.W.2d 242 (1979), where the issue was whether a party should be permitted to amend its pleading for a third time after a failure with a pretrial order, despite a specific warning of a potential dismissal motion prompted by the party's questionable allegations in its original and amended complaints.

Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d

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651 (1975), and Drehmel v. Radant, 75 Wis. 2d 223, 249 N.W.2d 274 (1977), are cases where the trial court found specific prejudice to the party against whom the motion was made and where wholly unrelated and new issues were injected into a proceeding. Metropolitan Sewerage District also dealt with a responsive pleading.

[11] We certified this issue to the Wisconsin Supreme Court on August 14, 1985. Certification was denied on October 8, 1985.

[12] The Fenendaels note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. They argue that it would be anomalous for the law to accord some respect for the unsupervised legal actions of an incompetent, but give none to a conservatee who is presumed competent. We acknowledge the anomaly but point out that this is an inconsistency more properly corrected by legislative, rather than judicial, action.

[13] We are aware that Peterson, having concluded that no prejudice inured to the defendant by virtue of the trial court amendment to the complaint, nonetheless remanded the case "to offer the parties an opportunity to submit additional evidence to ensure that the parties have a full opportunity to be heard on the issues litigated." Id. at 640, 312 N.W.2d at 795. Here, however, the Fenendaels have proffered to us the suggested evidence which they claim would have been offered in response to the

unpleaded issue. We have previously determined herein that such evidence is not relevant to the legal question presented by the requested amendment. In addition, we have attempted to discern other possible evidentiary material not suggested by the Fenendaels that could conceivably be relevant to this issue. We have discerned none.

Finally, this case was tried to a jury whereas Peterson was a trial to the court. Remand here for further evidentiary proceedings is impossible since the jury has been discharged.

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

CERTIFICATION of August 14, 1985
No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

May a conservatee make a gift of his or her property without the approval of the conservator or the court which ordered the appointment of the conservator?

FACTS

In November, 1981, Lillian Zobel petitioned the circuit court for the appointment of a conservator of her estate. The court appointed the appellants, Herbert and Helen Hancox as conservators of Zobel's estate. Prior to petitioning the court for the appointment of conservators, Zobel had sold her house on a land contract to the respondent, Gloria and Lee Fenendael. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March 1982, Zobel executed a deed in satisfaction of the land contract. Zobel did not inform the Hancoxes or he court of the pending transaction nor seek their approval prior to the execution of the deed.

The conservators, in an action to declare the deed void, claimed that Zobel, as a conservatee, lacked the capacity to make the gift without the approval of the conservators and/or the court. The trial court held that such approval was not necessary.

DISCUSSION

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118.

The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the property of an incompetent person. Sec. 880.31(3). Section 880.31 does not address the power or capacity of a conservatee to dispose of his or her property.

Here, the conservators rely on Evans to support their contention that a gift by a conservatee must have the approval of the conservators and the court. The question addressed in Evans, however, was "whether the trial court erred in authorizing the conservator to place the treasury notes owned by [the conservatee] in joint tenancy with others." Evans at 99, 135 N.W.2d at 833. The issue in

Evans, therefore, concerned the authority of the conservator to enter into a transaction and did not involve the authority of the conservatee to enter into transactions of dispose of property. Some language in Evans, however, suggests that the approval of the conservator and the court is necessary:

> Thus, a conservatee is not considered completely incapable of looking after his own property. A ward under guardianship is either a minor, incompetent, or a spendthrift. He is incapable of looking after his own property and it fits the statutory scheme for control of guardianships that the ward should not be able to control what should be done with his property. But in a conservatorship, where there is no adjudication that the applicant is incompetent, it makes sense to allow the conservatee freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection.

Evans at 100-01, 135 N.W.2d at 834

(footnote omitted; emphasis added). Given that the issue here was not directly before the court in Evans, we are uncertain whether Evans requires the approval of the conservator or the court before the conservatee makes a gift.

Nevertheless, the argument of the conservators is persuasive. As they point out, a conservatee is under the protection of the court because he or she is not able to properly manage his or her property. If the approval of the conservator or the court is not necessary for the conservatee to make a gift of his or her property, then what purpose does the conservatorship serve? Is it a flexible relationship in which the conservatee may choose when he or she desires the protection of the conservatorship? If so, could not the purpose of the conservatorship be undermined and the relationship rendered largely meaningless?

On the other hand, the facts of this particular case present an equally convincing argument for allowing a conservatee to gift property as he or she desires without the approval of the conservator or the court. The appointment of a conservator is not evidence of a person's competence or incompetence. Sec. 880.31(6), Stats. In this action to declare the deed void, the issue of Zobel's competency was litigated and the jury determined that she was competent at the time she made the gift. In executing the deed, Zobel had the assistance of an attorney who testified that he was satisfied that Zobel knew what she was doing when she executed the deed. There is a strong evidentiary record of Zobel's mental competency to gift her house. Her reluctance to inform her conservators was because she anticipated their

disapproval. If this court accepts the argument of the conservators, we would undo the clear intent of Zobel as found by the jury and supported by the evidence. We are reluctant to do so.

We also note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. It would appear anomolous for the law to accord some respect for the unsupervised legal actions of an incompetent under this statute, but give none to a conservatee who is presumed competent.

In conclusion, this court is uncertain a to the authority of a conservatee to dispose of his or her property. The statute provides little guidance and the case law is not particularly helpful. The supreme court should make the policy decision of whether the intent of the conservatee

ought to be the primary consideration, or whether the apparent Evans requirement that the conservator or the court approve of a gift ought to govern. We request, therefore, that the supreme court accept jurisdiction in this case.

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 8, 1986

To: Hon. John P. McGalloway, Jr.
Fond du Lac County Courthouse
Fond du Lac, WI 54935

David Colwin
Colwin, Fortune, Colwin,
Pomeroy & English, S.C.
P.O. Box 1476
Fond du Lac, WI 54935

Kenan J. Kersten
Kersten & McKinnon
231 W. Wisconsin Ave.,
Suite 1102
Milwaukee, WI 53203

The Court today announced an order in your case as follows:

No. 84-1539 Zobel v. Fenendael

The court having considered defendants-respondents-petitioners Lee and Gloria Fenendael's petition for review of an adverse decision of the court of appeals, district II, dated November 20, 1985,

IT IS ORDERED the petition for review is denied, with $50 costs to plaintiff-appellant Lillian Zobel.

Marilyn Graves
Clerk of Supreme Court

Portion of petition to Wisconsin Supreme Court to review. Referring to constitutional rights.

II. HOLDING THAT A CONSERVATEE IS LEGALLY PRECLUDED FROM GIFTING HER PROPERTY DEPRIVES A CONSERVATEE OF DUE PROCESS OF LAW FOR GIFTS MADE PRIOR TO THE EFFECTIVE DATE OF THAT HOLDING.

At the time of the gift (until the date of the court of appeals opinion) there was no existing Wisconsin law restricting the powers of a conservatee to dispose of property. (See Certification at 6). Without authority to the contrary, it is unconstitutional to deprive Lillian Zobel, as a matter of law, of the right to dispose of her own property in March of 1982 by an appellate decision rendered November 20, 1985. Denying review would result in a new pronouncement of law voiding an action which was valid at the time it occurred. Although the conservatorship statutes provide a mechanism whereby a transaction is voidable (dependent upon

the factual circumstance of competency), adherence to the court of appeals decision voids the transaction as a matter of law.

The only existing law pertaining to a conservatee's powers deals with factual competency, not legal competency. Section 880.31(6) expressly provides that a conservatorship "shall not be evidence of the competency or incompetency of the [conservatee]." Section 880.215 provides that a ward subject to a limited guardianship has the power to enter a valid contract and it will not be held void "unless the determination is made by the court in its finding under s. 880.33(3) that the ward is incapable of exercising the power to make contracts." It is clearly unconstitutional to permit an incompetent ward to convey and hold property in certain situations, yet preclude a

conservatee who has not had the benefit of a hearing regarding competency from gifting her own property.

This is particularly ironic in the case at bar where this legal issue was never raised until the close of the plaintiffs' case in chief and there was a three day trial where the mental incompetency was the sole issue at trial. A jury found that the conservatee was mentally competent and intended to gift her property to the Fenendaels and the trial judge entered judgment on that verdict. Considering the foregoing, the supreme court should not condone precedent which precludes, as a matter of law, a conservatee from conveying property when it has already been litigated and decided that she was mentally competent when she did so. As the court of appeals notes, it is not even remanding the matter to the trial

court for further findings or an additional evidentiary hearing where testimony from the conservatorship court can be presented. Opinion, n.13 at 21. It merely voids the transaction, reversing the judgment entered on the jury's verdict.

The court of appeals voids this finding of mental competency and creates a legal preclusion which did not exist at the time of the transaction. As the Wisconsin Supreme Court has recognized:

> There is a high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or by will, - holds. It is not the business of courts to undo what an old person may have done with h[er] property because of judicial notions of propriety or moral obligations, in a case of this sort, where the wishes of relatives, however deserving. Did the [wo]man do freely what [s]he wanted to and was competent to decide upon? Those are the sole questions.

In re Estate of Bauer, 264 Wis. 556, 561, 59 N.W.2d 481 (1956)(quoting Boardman v. Lorentzen, 155 Wis. 566, 579, 145 N.W. 750 (1915)(emphasis supplied)). The court of appeals decision, creates law which is incongruous with the existing statutory law pertaining to conservatorships and guardianships and voids the clearly intended and competent act that Lillian Zobel took in March of 1982. This unwarranted deprivation of Lillian Zobel's constitutional rights, on an ex post facto basis, in and of itself warrants this court's review pursuant to Rule 809.62(1)(a).

III. WISCONSIN STATUTES SECTION 809.62(1)(d) APPLIES.

Although the issue of law determined by the supreme court in Estate of Evans related to the authority of a conservator, the court did state that "a conservatee is not considered completely

incapable of looking after his own property" (28 Wis. 2d at 100) and that it should not be necessary for a competent conservatee to terminate the conservatorship in order to consummate competently intended transactions. 28 Wis. 2d at 101. To the extent the court in Evans intended to keep the concept of conservatorship sufficiently flexible to permit the conservatee to act outside the conservatorship under certain circumstances, the court of appeals decision in this case conflicts with Evans. Since there is no controlling supreme court decision or Wisconsin statute requiring the court of appeals holding herein, the supreme court should review and decide this case to resolve that apparent conflict. If, as the court indicated in Evans, the concept of conservatorship is to be sufficiently flexible to recognize as valid acts of

conservatees in certain cases, this, under the undisputed record, is such a case. Rather than repeating the extensive evidentiary record reviewed in the statement of facts herein upon which Lillian Zobel was found at trial to have been competent at the time in question, it should suffice to cite the court of appeals' statement that "there is a strong evidentiary record of Zobel's mental competency to gift her house" (Certification at 5) and that "invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to have been competent at the time of the gift" (Opinion at 16)(emphasis supplied).

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state capitols wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis supplied).

Wisconsin Constitution, Article I

Declaration of Rights

> Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights,

governments are instituted, deriving their just powers from the consent of the governed.

Wis. Const. art. I, § 1.

Wisconsin's Conservatorship Statute

880.31 Voluntary Proceedings; Conservators

(1) Any adult resident who believes that he or she is unable properly to manage his or her property or income may voluntarily apply to the circuit court of the county of his or her residence for appointment of a conservator of the estate. Upon receipt of the application the court shall fix a time and place for hearing the application and direct to whom and in what manner notice of the hearing shall be given.

(2) At the time of such hearing the applicant shall be personally examined and if the court is satisfied that the applicant desires a conservator and that the fiduciary nominated is suitable, the court may appoint him as such and issue letters of conservatorship to him

upon the filing of a bond in the amount fixed by the court.

(3) A conservator shall have all the powers and duties of a guardian of the property of an incompetent person. The conservator's powers shall cease upon being removed by the court or upon death of the person whose estate is being conserved.

(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent, remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(5) If the court shall upon such hearing

determine that the person whose estate is administered by a conservator may be incapable of handling his estate, the court shall order the conservatorship continued, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(6) Appointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered.

(7) If an application for conservatorship is filed, the fee prescribed in s. 814.66(1)(b) shall be paid at the time of the filing of the inventory or other documents setting forth the value of the estate.

Wis. Stats. § 880.31 (emphasis supplied).